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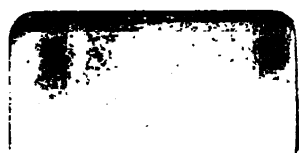
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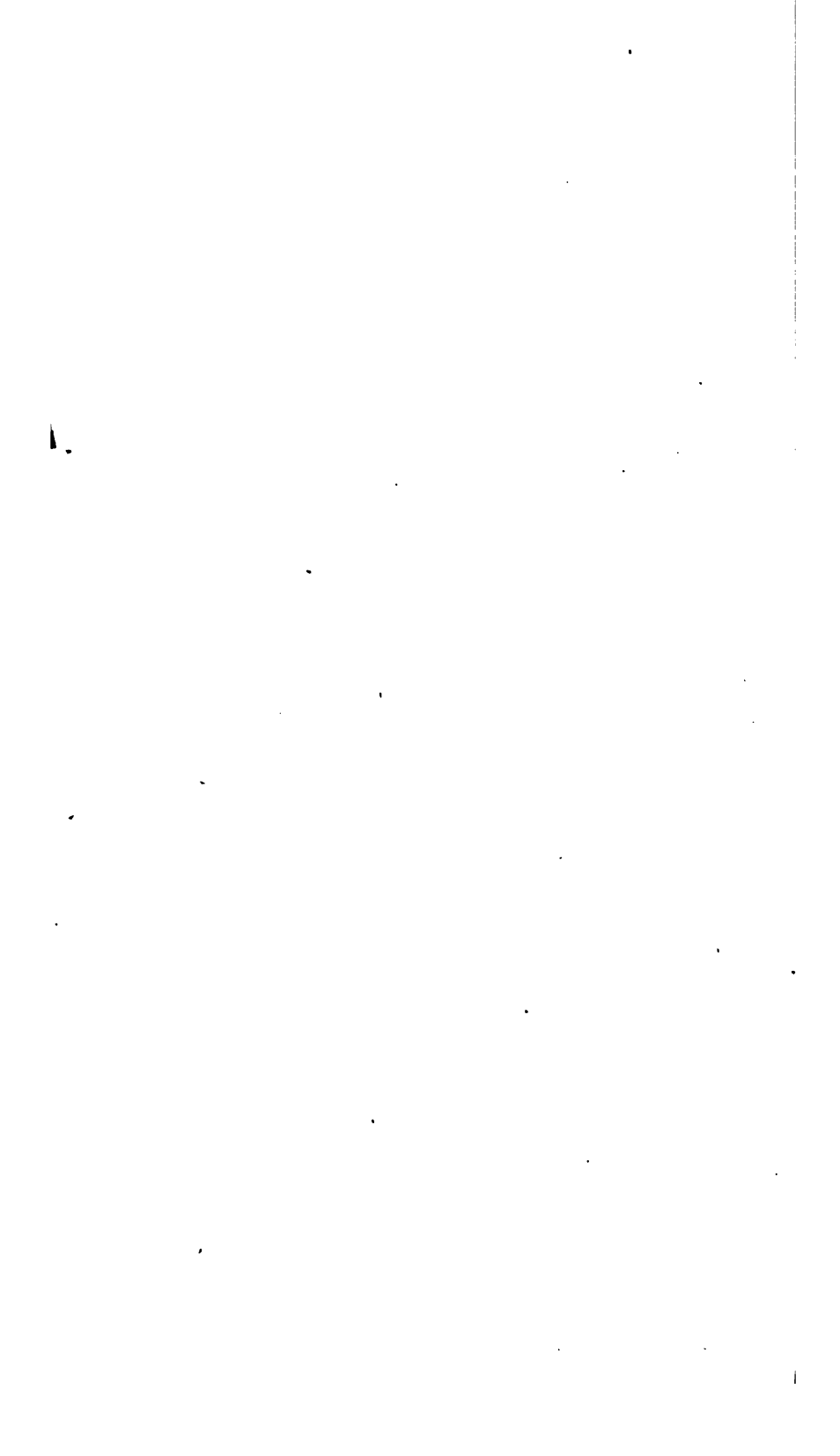
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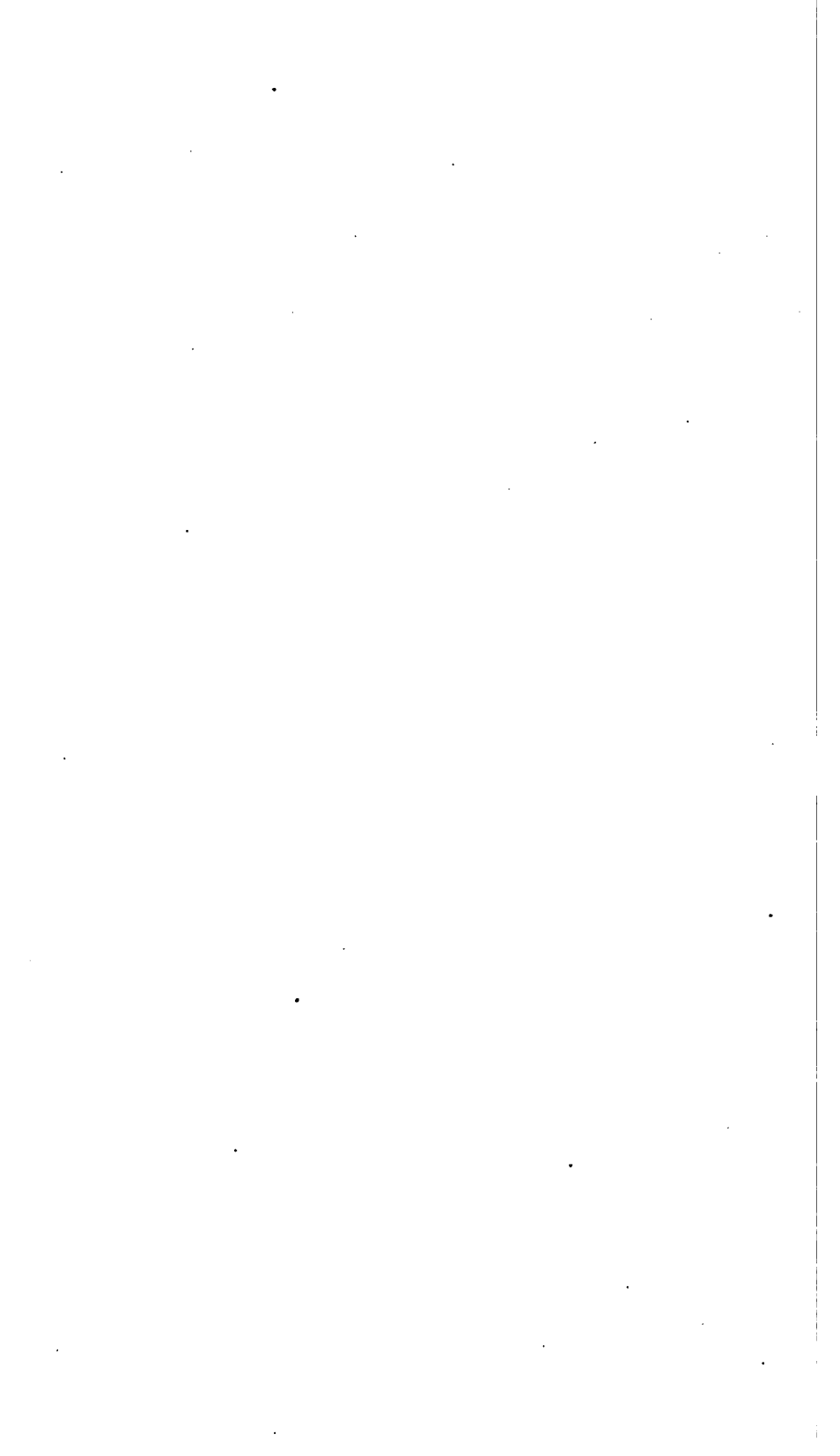
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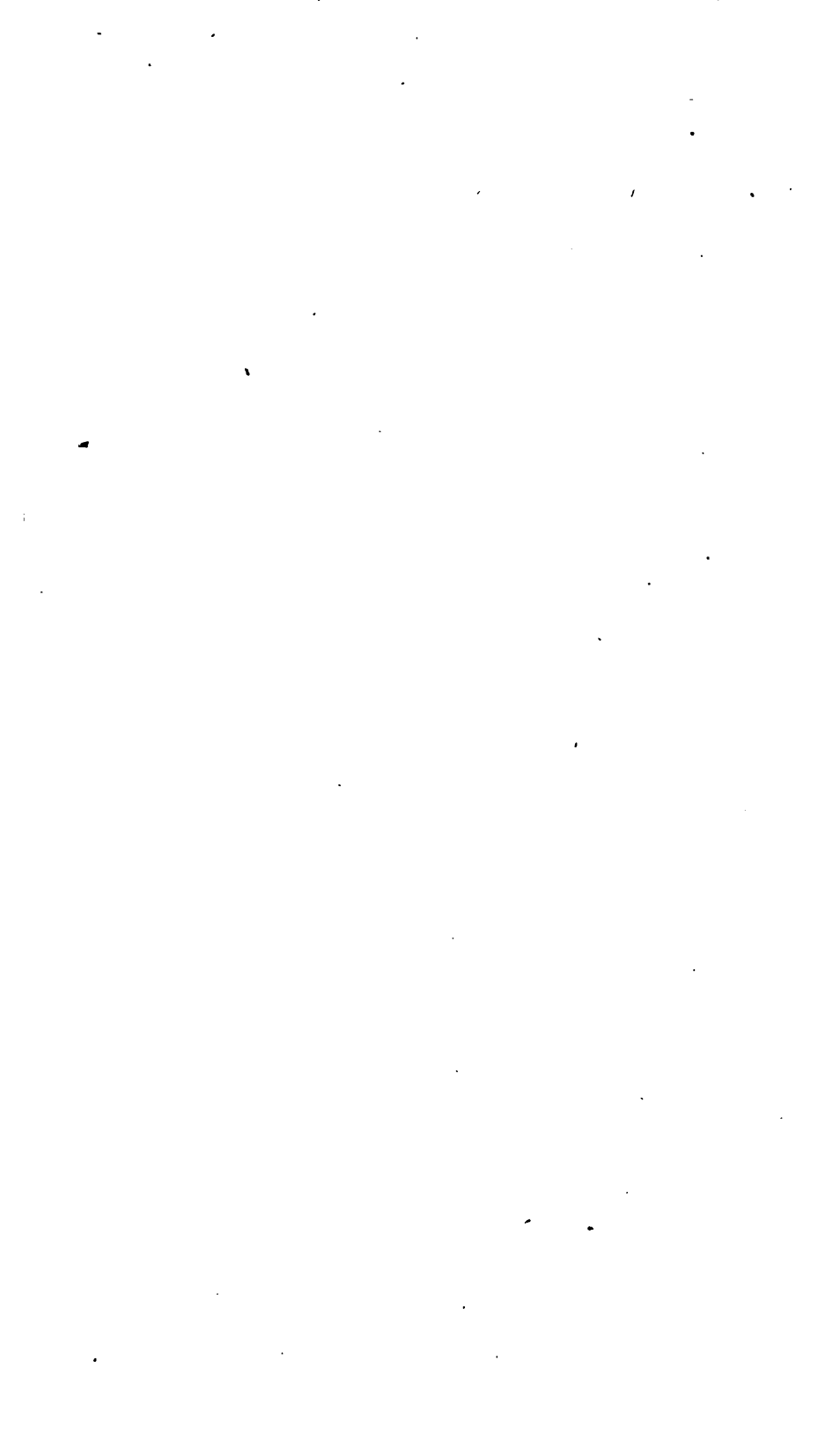
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1889.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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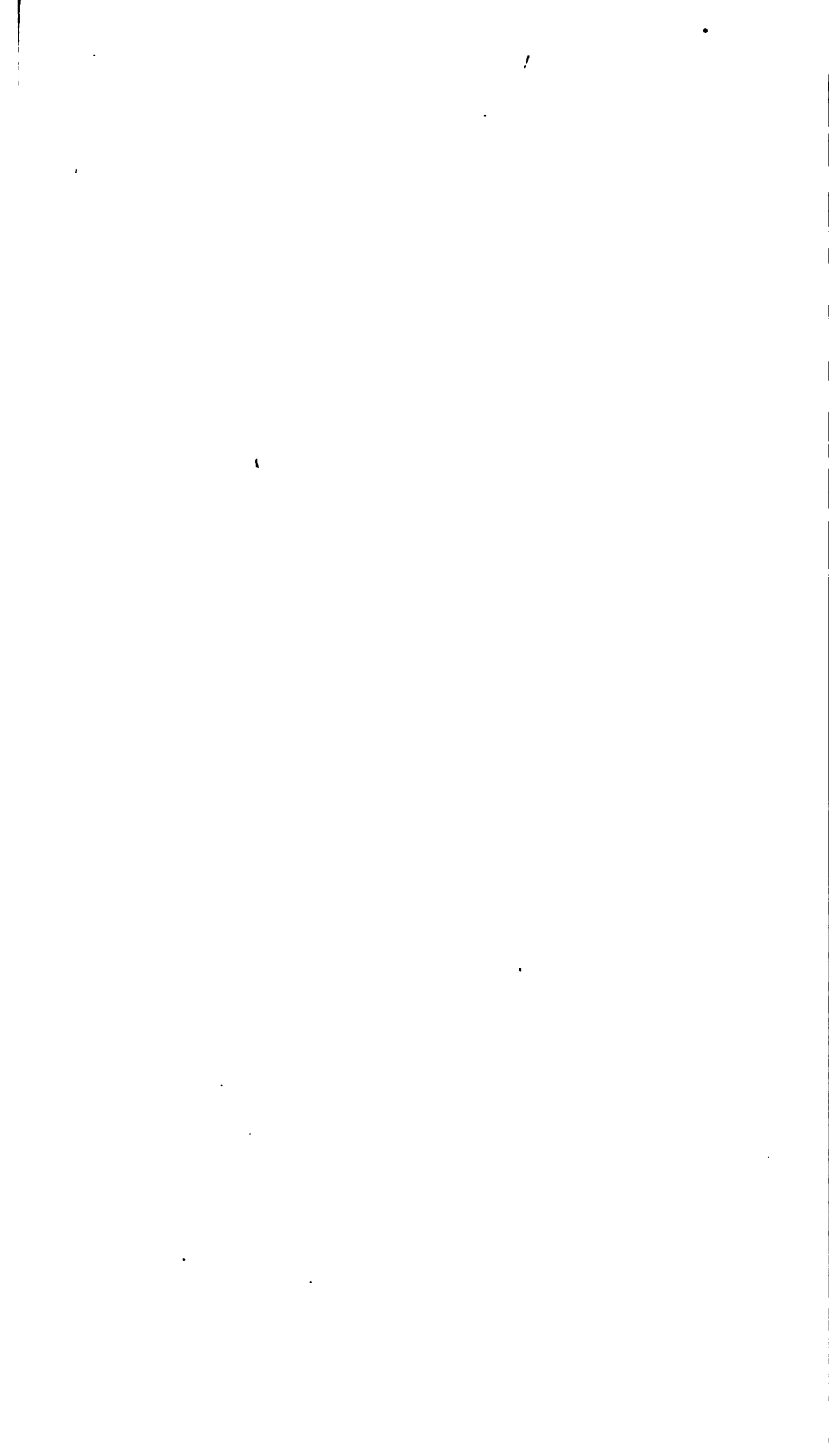
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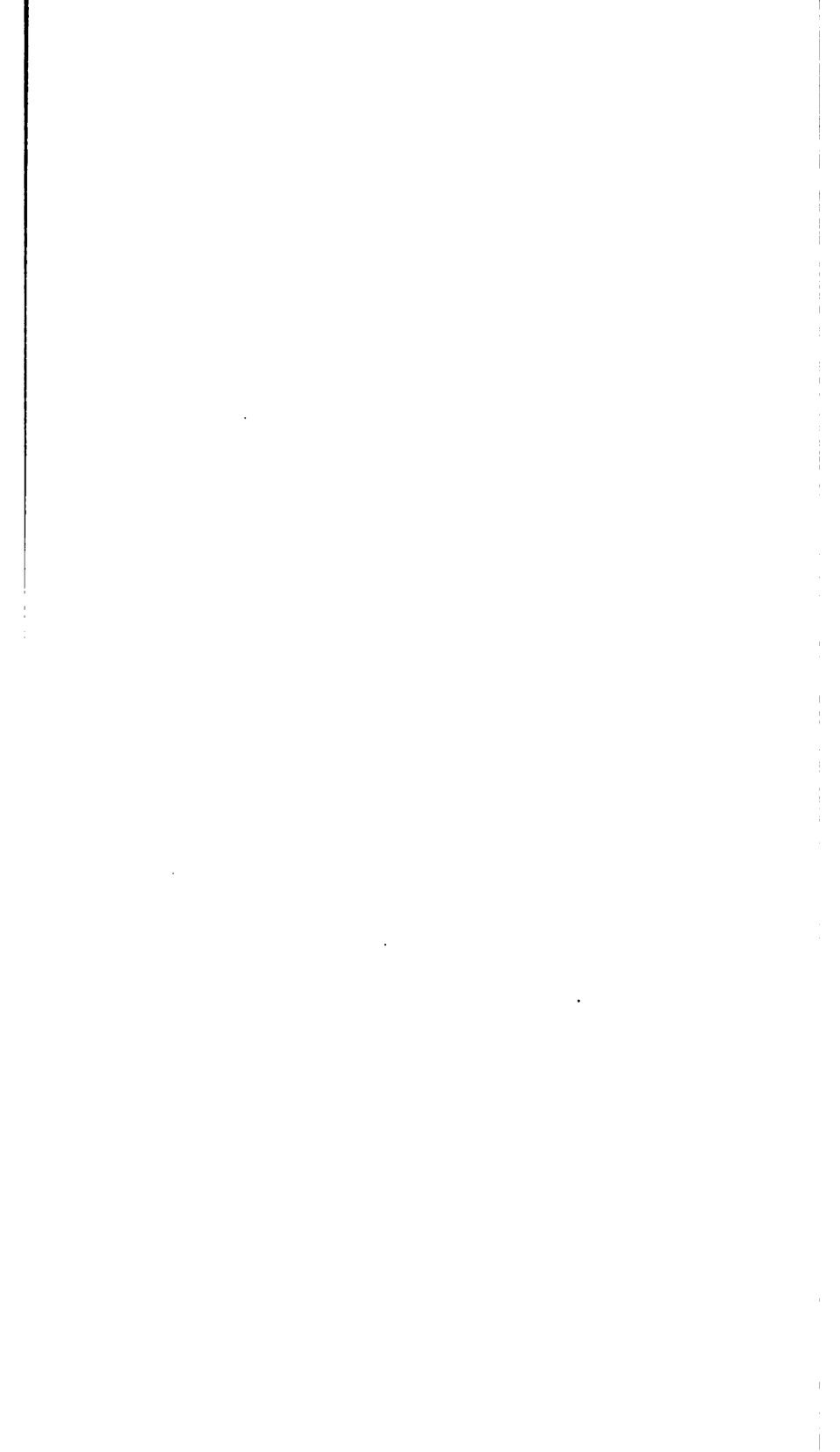
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AMERICAN DECISIONS.

VOL. LXXIX



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

STEELE v. TOWNSEND.

[37 ALABAMA, 247.]

COMMON CARRIER CANNOT LIMIT HIS COMMON-LAW LIABILITY BY ANY GENERAL NOTICE, but may do so by special contract with shipper; and bill of lading given by carrier on receipt of goods, and accepted by shipper, is a special contract within this rule.

COMMON CARRIER CANNOT CONTRACT FOR IMMUNITY FROM CONSEQUENCES OF HIS OWN NEGLIGENCE, or that of his servants or agents, and an exception in a bill of lading will not be construed to have that effect.

EVIDENCE TENDING TO SHOW THAT "BREAKAGE" COMPLAINED OF DID NOT RESULT FROM PLAINTIFF'S NEGLIGENCE, in action by common carrier for freight, is admissible on behalf of plaintiff, and he may show that articles similar to those specified in the bill of lading were usually in a damaged condition on their arrival.

WHERE CONTRACT EXISTS BETWEEN COMMON CARRIER AND SHIPPER, LIMITING FORMER'S LIABILITY, and a loss or injury occurs, the burden of proof is on the carrier to show, not only that the cause of the injury is within the exception, but that the injury did not result from the carrier's negligence.

ACTION by common carrier for freight, for carrying goods from Philadelphia to Mobile. The bills of lading contained a clause "not accountable for rust or breakage." The goods consisted of stoves, kettles, pots, pans, etc. Plaintiff put in evidence that the goods were well stowed, and were not broken or damaged in discharging them, and that proper care and skill were employed in discharging them from the vessel. Defendants' evidence tended to show that the goods were much broken upon the vessel and upon the wharf before delivery, and that the breakage was equal to the amount of freight claimed. Plaintiff offered evidence tending to show that ship-

ments of such goods coming to Mobile, upon vessels by sea, were usually in a damaged and broken condition on arrival. Defendants objected to this evidence, and excepted to its admission against their objection. It was also in evidence that plaintiff was master of the vessel, a common carrier, on which the goods were shipped; but the only evidence to show any special contract for the carriage of the goods was the bills of lading admitted to be genuine. The court charged the jury, "that if the goods mentioned in the bills of lading were of a brittle nature, and very liable to rust and breakage in the transportation and handling, then the exception in the bills of lading 'not accountable for rust or breakage,' was to some extent valid in favor of plaintiff; that notwithstanding that clause in the bills of lading, the plaintiff was bound to use the highest degree of diligence according to the nature of the goods, to avoid damage to them; but that if, after using such diligence and taking the greatest care, they were broken without any neglect or want of care on his part, then under his bills of lading he would not be liable in damage for such breakage, nor would the same be a defense or bar to his right to recover freight." Defendants excepted to this charge, and asked the court to charge the jury: "1. That if there was no other evidence of a special contract than the words 'not accountable for rust or breakage' in the bills of lading, these words did not show such a special contract between the carrier and the shipper as would limit the responsibility of the former as to breakage; 2. That if the goods were in good order when received by the plaintiff, and in bad order when landed, the plaintiff could only discharge himself by showing that he had not been negligent, and had taken that care which the nature of the articles required, from the time he received them in good order until he delivered them to the defendants." The court refused to so charge, and defendants excepted; but the court did give the second charge, after inserting the word "unusually" before the words "bad order," to which qualification defendants also accepted. The several rulings of the court to which exceptions were reserved are now assigned as error.

R. B. Armistead, for the appellants.

A. R. Manning, *contra*.

By Court, R. W. WALKER, J. 1. Whatever doubts may at one time have been entertained on the subject, it is now well settled that although a common carrier cannot limit the liability

which the common law devolves on him by any general notice, he may do so by special contract with the shipper: *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 490, 491 [62 Am. Dec. 125]; S. C., 4 Sandf. 141, 142; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; Angell on Carriers, secs. 220, 221, 225, 233; 1 Parsons on Contracts, 203, 204. And it seems to be considered that a bill of lading, given by the carrier on receipt of the goods and accepted by the shipper, is a special contract between the parties, within the meaning of this rule: *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 486, 491 [62 Am. Dec. 125]; Edwards on Bailments, 468; *Swindler v. Hilliard*, 2 Rich. L. 303 [45 Am. Dec. 732]; Story on Bailments, sec. 550. Yet such contract, limiting his common-law responsibility, cannot be pleaded by the carrier as an exemption for any loss or damage resulting from his own negligence: *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 144; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 136; *Swindler v. Hilliard*, 2 Rich. L. 286 [45 Am. Dec. 732]; *Baker v. Brinson*, 9 Id. 201 [67 Am. Dec. 548]; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Id. 362 [62 Am. Dec. 285]; *Merriman v. Brig May Queen*, 1 Newb. Adm. 464; 1 Parsons on Maritime Law, 179, note.

2. As the exception contained in the contract did not have the effect of relieving the plaintiff from liability for any "breakage" which was the result of his negligence, it follows that evidence, tending to show that the breakage complained of was not the result of the plaintiff's negligence was admissible in his behalf; and we hold that, for this purpose, it was competent for the plaintiff to show that articles similar to those specified in the bill of lading, coming to Mobile upon vessels by sea, were usually in a damaged and broken condition on their arrival. If such articles, when shipped by sea, usually arrived uninjured, this would be a circumstance tending to show that the "breakage," when any did occur, was the result of negligence on the part of the carrier. The contrary proof would have a contrary tendency: See *Ingram v. Lawson*, 6 Bing. N. C. 212; S. C., 37 Eng. Com. L. 350, 351; *Donnell v. Jones*, 17 Ala. 690, 695 [52 Am. Dec. 194].

The decision of this court, in *O'Grady v. Julian*, 34 Ala. 88, is relied on by the counsel for appellant, as in conflict with the opinion here expressed. It is possible that, in the case just cited, the court may have placed an improper construction upon the language of the bill of exceptions. But the evidence which was there held to be inadmissible was understood

by the court as relating to the usual profits made by particular establishments in the neighborhood, and not as referring to the average percentage of profit realized by similar establishments in the neighborhood. The decision was intended to apply and must be confined to cases in which it is proposed to prove the profits of particular establishments; that is, to take individual instances, and prove the usual profits of each--the effect of permitting which would be to nullify the issues indefinitely.

3. The difficult point in the case arises upon the charge which was asked by the defendants, and which the court refused to give.

In reference to special agreements, limiting the carrier's responsibility, Nelson, J., in delivering the opinion in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 384, uses this language: "The owner of goods, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of a bailee for hire, and answerable only for misconduct or negligence." See also *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 145 [62 Am. Dec. 125]; S. C., 11 N. Y. 493. And it has been held on several occasions, that although a special contract qualifying a carrier's responsibility does not exempt him from liability for loss resulting from his negligence, yet that in such case, the burden of proving negligence is on the shipper: Authorities *supra*; *Clark v. Barnwell*, 12 How. 280; *Hunt v. Propeller Cleveland*, 6 McLean, 26; S. C., 1 Newb. Adm. 222, 223; *Merriman v. Brig May Queen*, Id. 464; see 1 Parsons on Maritime Law, 150, 151; Angell on Carriers, secs. 61, 276

On the other hand, and in cases in which the question received the most thorough consideration, it has been decided that where there is a special contract, limiting the carrier's responsibility, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, is on the carrier: *Swindler v. Hilliard*, 2 Rich. L. 286 [45 Am. Dec. 732]; *Baker v. Brinson*, 9 Id. 201 [67 Am. Dec. 548]; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Id. 362 [62 Am. Dec. 285]; *Camden and Amboy R. R. Co. v. Baldauf*, 16 Pa. St. 67 [55 Am. Dec. 481]; 2 Greenl. Ev., sec. 219.

Without adopting this rule in the terms in which it is here

stated, we think it is so far true, in the present case, that an injury by "breakage" to the articles shipped is not brought within the terms of the exception, unless it is also shown that the "breakage" was not the result of the negligence of the carrier. In other words, the exception includes only such breakage as care and diligence could not prevent, and the injury is not within the exception until it is shown that it occurred, notwithstanding the exercise of such care and diligence. It is not strictly accurate to say that the *onus* is on the carrier to show, not only that the cause of loss was within the exception, but also that he exercised due care. The correct view is, that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and as it is for the carrier to bring himself within the exception, he must make, at least, a *prima facie* showing that the injury was not caused by his neglect.

It is a mistake to suppose that, by the insertion of such an exception as is found in this bill of lading, the character of the employment is changed. The party receiving the goods still remains, notwithstanding this feature of the contract, a common carrier; his liability only, to the extent of the exception, is diminished. "In all things else, the very same principles apply. Care and diligence are still elements of the contract, and 'strict proof' is properly required before any exemption may be claimed:" *Baker v. Brinson*, 9 Rich. L. 203 [67 Am. Dec. 548].

In most cases of bailment, the bailee is chargeable, not by the delivery of the goods, but by reason of negligence. Hence, in the case of ordinary bailments, the general rule is that to hold the bailee responsible, negligence must be alleged and proved; though some courts have considered that the bailee should be held to proof of the facts and circumstances under which the loss occurred: *Clark v. Spence*, 10 Watts, 335; *Logan v. Mathews*, 6 Pa. St. 419; *Swindler v. Hilliard*, 2 Rich. L. 305, 306 [45 Am. Dec. 732]. But in relation to common carriers, the rule is, that in all cases of loss the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie*, the law imposes the obligation of safety upon him. Consequently, the owner is bound to prove no more than that the goods were delivered to the carrier, and that the latter had not delivered them to the consignee. These facts constitute *prima facie* evidence of negligence or misconduct: Angell on Carriers, sec. 202; Story on Bailments, sec. 529.

By the common law, the carrier is responsible for all losses,

except such as result from the act of God or the public enemy. Hence his liability is not confined to such losses as are the consequences of his own negligence or want of skill. He is liable for losses by accident, mistake, and numerous unavoidable occurrences not falling under the head of acts of God or the public enemy, and against which it is not within the reach of human vigilance or foresight to provide. For losses occasioned by the wrongful acts of third persons, by accidental fires, by robbery, or by the violence of mobs, which neither the carrier nor his agents can resist, or by any vigilance avoid, he is responsible: 1 Smith's Lead. Cas. 315; *Davidson v. Graham*, 2 Ohio St. 137. The liabilities of a common carrier are thus distinguished into two classes: the one, a liability for losses by neglect, which is the liability of a bailee; the other, a liability for losses by accident, or other unavoidable occurrence, which is the liability of an insurer. In *Riley v. Horne*, 5 Bing. 217, Best, C. J., uses this language: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them, to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has therefore added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God and of the king's enemies.

On grounds of public policy, the courts have manifested a disposition to construe any new exceptions to the liability of a common carrier strictly against him: *Atwood v. Reliance Transportation Co.*, 9 Watts, 87 [34 Am. Dec. 503]. Without the exception, the carrier would be liable as an insurer for a loss from the specified cause; and the only legitimate effect of the exception is, to relieve the carrier from this extraordinary responsibility for a loss which could not have been prevented by proper care and diligence on his part. When, therefore, a carrier, as in this case, provides against accountability for

"rust or breakage," the proper construction of the exception is, that the carrier is not to be held liable as an insurer for "rust or breakage" which occurs without negligence on his part; but that he remains, as before, responsible for any injury of the kind mentioned, if caused by his failure to exercise the degree of care which the law demands of every common carrier in respect of the goods committed to him. The making of such exception does not change the character of the employment, or the rules of evidence before applicable to the subject. Hence a *prima facie* case of negligence is made out against the carrier, by showing that the goods were delivered to him, and that he has either not delivered them at all, or has delivered them in an injured condition.

Where a carrier seeks to bring a loss within the common-law exception of "an act of God," he cannot throw upon the employer the burden of proving or inferring negligence or defective means in the carrier until he has shown the intervention of such an extraordinary, violent, and destructive agent, as by its very nature raises a presumption that no human means could resist its effect: 1 Smith's Lead. Cas., 5th Am. ed., 318; *Coosa R. S. Co. v. Barclay*, 30 Ala. 128, 129; *Steele v. McTyer*, 31 Id. 676 [70 Am. Dec. 516]. "The true view is, not that the carrier discharges his liability by showing an act of God, and is then responsible, as an ordinary agent, for negligence, but that the intervention of negligence breaks the carrier's line of defense by showing that the injury or loss was not directly caused by the act of God, or more correctly speaking, was not the act of God:" 1 Smith's Lead. Cas. 319.

In like manner, the exception of "perils of the sea," and "dangers of the river," means such as cannot be avoided by the exercise of that discretion and care which the law requires of common carriers; and to ascertain whether a loss falls within the exception, it must be inquired whether the accident could have been prevented by the exercise of proper foresight and diligence: 1 Smith's Lead. Cas. 316; *Williams v. Branson*, 1 Murph. 417 [4 Am. Dec. 562]; *Marsh v. Blyth*, 1 Nott & M. 170; *Jones v. Pitcher*, 3 Stew. & P. 136, 171 [24 Am. Dec. 716]. Thus where goods were received on board a steamboat, and the bill of lading contained an exception of "dangers of the river," and the loss was occasioned by the boat's striking on a sunken rock, it was held incumbent on the carrier to prove that due diligence and proper skill were used to avoid the accident: *Whitesides v. Russell*, 8 Watts & S. 44.

The same principle must apply to the present exception. The proof of injury makes a *prima facie* case of negligence against the carrier, and he does not bring the injury within the exception until he shows the exercise of due vigilance on his part to prevent the injury; unless, indeed, the nature of the injury, or of the property, be such as to furnish of itself evidence that due care and diligence could not have prevented the injury.

There is no hardship in such a rule, and many strong reasons unite to commend it to our approval. It is of the utmost importance to the commerce of the country that carriers should be held to a strict accountability. On this subject, we concur in the remark of Chief Justice Gibson, that "though it is, perhaps, too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them:" *Atwood v. Reliance Transportation Co.*, 9 Watts, 87 [34 Am. Dec. 503]. This is especially so in reference to exceptions inserted in bills of lading. Goods are commonly sent by the owner to the carrier's place of business, where they are received, and the bill of lading made out by the carrier or his clerk. It is often not seen by the owner until it is too late to insist on a change in the terms. These considerations have induced one eminent judge to say that the better rule, perhaps, would be to treat all such provisions in bills of lading as void, unless inserted by the express consent of the employer: *Black, C. J.*, in *Chouteaux v. Leach*, 18 Pa. St. 233 [57 Am. Dec. 602].

One result of the introduction of steamboats and railroads is, that common carriers have, to a great extent, taken exclusive possession of the public thoroughfares of the country, and have it in their power to impose their own terms upon the owners of goods, who, indeed, have no choice but to employ them. The owner accepts the conditional bill of lading, because he cannot well help it. He must have his goods carried, and he sees that the carrier will refuse to take them unless the prescribed terms are accepted. The owner seldom accompanies his property, and in case of loss or injury, however gross the negligence may be, is unable to prove it, without relying upon the servants of the carrier—the very persons, generally, by whose negligence (if there was any negligence) the goods have been lost; whose feelings, wishes, and interests

are all against the owner, and who are, as a general rule, only too ready to exculpate themselves and their employer. Of the manner of the loss, the owner is generally entirely ignorant, while the carrier and his servants may be reasonably supposed to be fully advised in regard to it; and "that is a sound rule which devolves the *onus* on him who best knows what the facts are."

The result of what has been said is, that if the goods were in good order when received by the plaintiff in Philadelphia, and in bad order from "breakage" when delivered in Mobile, it devolved upon the carrier to show that proper diligence and skill were exercised to prevent the injury; unless, as before remarked, it appears that the nature of the injury, or of the property, is such as to show, of itself, that due care and diligence could not have prevented the injury. The charge asked should have been given.

Judgment reversed, and cause remanded.

COMMON CARRIER CANNOT, BY GENERAL NOTICE, LIMIT HIS COMMON-LAW LIABILITY: *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 567; *Hale v. New Jersey S. N. Co.*, 39 Id. 398; *Moses v. Boston etc. R. R. Co.*, 55 Id. 222; *Cole v. Goodwin*, 32 Id. 470; *West. Transp. Co. v. Newhall*, 76 Id. 780, and note 775; but may do so by special contract, express or implied: *Galena etc. R. R. Co. v. Rae*, 68 Id. 574; *Bingham v. Rogers*, 40 Id. 581; *Thomas v. Ship Morning Glory*, 71 Id. 509; *Dorr v. New Jersey S. N. Co.*, 62 Id. 125; but cannot, by contract, relieve himself from responsibility for losses caused by his negligence: *Graham v. Davis*, Id. 285; *Reno v. Hogan*, 54 Id. 513; *Cole v. Goodwin*, 32 Id. 470; *Welsh v. Pittsburgh etc. R. R. Co.*, 75 Id. 490, and note 498; and the burden of proof is on the carrier to show that the loss is within the excepted stipulation, and that there was no negligence: *Baker v. Brinson*, 67 Id. 548, and note 550; compare *Thomas v. Ship Morning Glory*, 71 Id. 509; *Day v. Radley*, 42 Id. 489; *Cameron v. Rich*, 53 Id. 670, and note 672.

THE PRINCIPAL CASE IS CITED in *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 500, *Mobile etc. R. R. Co. v. Jarboe*, 41 Id. 647, and *South and North Ala. R. R. Co. v. Henlein*, 52 Id. 612, to the point that a common carrier may legally contract for exemption from that extraordinary responsibility imposed by common law, by which he becomes an insurer. It is cited in *Alabama etc. R. R. Co. v. Little*, 71 Id. 614, to the point that a bill of lading, given by carrier and accepted by shipper, limiting the common-law liability of the former, is regarded as a special contract. It is cited to the point that a common carrier cannot stipulate for immunity against damage resulting from his own negligence or that of his servants, in *South and North Ala. R. R. Co. v. Henlein*, 52 Id. 372; *Alabama etc. R. R. Co. v. Little*, 71 Id. 614; *Ohio etc. R. R. Co. v. Selby*, 47 Id. 486; *Railroad Co. v. Lockwood*, 17 Wall. 371; to the point that a common carrier does not change his character as such, merely by entering into a contract for limiting his responsibility, in *Mobile etc. R. R. Co. v. Jarboe*, 41 Ala. 647; *Railroad Co. v. Lockwood*, 17 Wall. 377, and to the point that when a loss or injury occurs, the burden of proof is upon the carrier, to exempt himself from liability, in *South and North Ala. R. R. Co. v. Henlein*, 52 Ala. 612; *East Tenn. etc. R. R. Co. v. Johnston*, 75 Id. 605.

CONNOR v. TRAWICK'S ADMINISTRATOR.

[57 ALABAMA, 239.]

GIFT OF PERSONALTY, AT COMMON LAW, CAN ONLY BE CONSUMMATED BY DEED, or other instrument under seal, in the absence of an actual delivery of the thing itself.

DELIVERY OF DEED CONSUMMATES GIFT ON PRINCIPLE OF ESTOPPEL, and not because the delivery of the deed is a symbolical delivery of the property.

COURTS OF ONE STATE WILL PRESUME THAT COMMON LAW PREVAILS IN OTHER STATES HAVING COMMON ORIGIN, in the absence of evidence to the contrary.

ACTION by B. T. Connor, infant, suing by next friend, to recover a slave named Toby, which plaintiff claimed under an alleged gift from his grandfather, B. Trawick, deceased, as evidenced by an instrument in writing not under seal, but signed by B. Trawick, and containing the following words: "I give and convey to my grandson, Burwell T. Connor, my boy Toby." The instrument was executed in the state of Mississippi, and delivered by said B. Trawick to one E. M. Wells, in the presence of two witnesses. It was in evidence that at the time of the delivery of the instrument, B. Trawick called up the negroes, and told them to whom he had given each one, that he had given Toby to B. T. Connor, and had appointed said Wells his trustee and guardian to see to them. By the terms of the instrument, the donee was not to have possession until after the death of the donor, and the slave Toby continued in the possession of B. Trawick up to the time of his death, and on the final distribution of his estate was allotted to I. A. Trawick, the defendant's intestate. On this evidence, the court charged the jury: "1. That the instrument under which the plaintiff claims the slave is not a deed, and has not the effect and operation of a deed in this case; 2. That if said instrument was executed by B. Trawick, and by him delivered to Wells, such delivery would not be sufficient, of itself, to pass title from Trawick by way of gift, unless the slave was also delivered; and 3. That to constitute a valid gift, there must have been some ostensible act done to signify a transfer of the possession of the slave, and connected therewith, a present intention, on the part of the donor, to pass the dominion over the property from himself to the donee, or to some one else for him." Plaintiff excepted to each of these charges, and then requested the court to instruct the jury "that if they believed from the evidence that B. Trawick intended to give

the boy Toby to the plaintiff, and in order to carry out this intention wrote the instrument read in evidence, and called on persons present to witness its execution, and signed it in their presence, and delivered it to E. M. Wells, thereby intending at the time to convey said boy to the plaintiff, and that the boy Toby was then present—then the jury must find for the plaintiff." The court refused to give this charge, without qualification, and the plaintiff excepted to its refusal. The charges given by the court, and the refusal of the charge asked, are now assigned as error.

Brooks and Garrott, for the appellant.

S. F. Hale, *contra*.

By Court, R. W. WALKER, J. It has long been understood to be the law that, in the absence of an actual delivery of the property, a gift can only be made by deed, or other instrument under seal. In the present case, there could be no actual delivery of the property, because, by the terms of the alleged gift, the donee was not to have possession until after the death of the donor; and as the writing relied on is not under seal, we must decide that there was not a valid gift, unless we are prepared to repudiate the rule above stated, and to hold that a gift may be consummated, as well by the delivery of an unsealed writing declaring its terms as by the delivery of the property itself, or of a deed or other instrument under seal.

It is argued that a deed effectuates the gift, because the delivery of the deed is but a symbolical delivery of the property; that as the title to personalty passes by unsealed writing as well as by deed, there is no good reason why the former, as well as the latter, should not operate a constructive delivery of the property; and that, if there ever was any substantial ground for a distinction between the two classes of writings, as the means of consummating gifts, it no longer exists, and the distinction has thus become obsolete. It is a mistake, however, to suppose that the reason why the delivery of a deed declaring the gift has the same effect, as between the parties, as the actual delivery of the property, is because the delivery of the deed is but a symbolical delivery of the thing. That would not have been so in the present case, if the donor had delivered a deed, instead of an unsealed writing; for by the terms of the gift, no immediate delivery of the property was intended, but the donor was to retain the possession and control of it so long as he lived.

It is, rather, upon the principle of estoppel that, for the purpose of consummating a gift, the delivery of a deed is as effectual as the delivery of the property. According to the ancient common law, the seal was invested with great solemnity and force. "Words pass from man to man lightly and inconsiderately; but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution. So that there is great deliberation used in the making of deeds; for which reason, they are received as a lien final to the party, and are adjudged to bind the party, without examining upon what cause or consideration they were made. As if I by deed promise to give you twenty pounds, here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable; it is sufficient to say it was the will of the party who made the deed:" Plowden, *arguendo*, in *Sharington v. Strotton*, Plowd. 308.

Although it is true that, in modern times, the seal has been stripped of much of its ancient force, the doctrine of estoppel by deed is still maintained. Hence where a gift of personal property is made by deed, the delivery of the deed transfers the right to the property; for the reason that the form of the instrument imports a consideration for the transfer, and the maker of the deed is estopped thereby from asserting that he has not granted to the donee a power of control and dominion over the property conveyed by the deed; and this irrevocable transfer of dominion is the "one thing needful" to perfect a gift. "The deed does not operate on the property, in virtue of its being a symbol of it, but because it carries on its face an acknowledged right in the grantee to control it. A symbolical delivery of one thing, in the name of another, is no delivery of the latter. The argument of Lord Chancellor Hardwicke, in *Ward v. Turner*, 2 Ves. sen. 431, is conclusive upon this point. But if the key be delivered, of a desk in which a paper or a jewel is contained, the paper or jewel is thereby delivered; he who has the key has the dominion of it. A deed stands upon analogous grounds, and whenever the deed is effectually executed and delivered, it draws to the grantee the thing, according to its terms:" *Jaggers v. Estes*, 3 Strobb. Eq. 380 [49 Am. Dec. 674].

But unless the donor has executed a deed, whereby he is estopped from saying that the property has not passed to the donee, no mere verbal or written declaration will consummate the gift; the doctrine of estoppel does not apply to such a case; and unless there be a deed, or a contract supported by a valuable consideration, the proprietary right of control cannot pass without a delivery of the property. Hence a parol declaration of gift (whether verbal or by unsealed writing) stands upon the footing of a mere promise to give, and is void in law: See Addison on Contracts, 12, 27; 1 Parsons on Contracts, 201; Williams on Personal Property, 33-35; *McCutchen v. McCutchen*, 9 Port. 650, 656, 657; *Irons v. Smallpiece*, 2 Barn. & Ald. 551; *Miller v. Anderson*, 4 Rich. Eq. 1; *Busby v. Byrd*, Id. 9; *Jaggers v. Estes*, 3 Strobb. Eq. 379 [49 Am. Dec. 674]; *Morrow v. Williams*, 3 Dev. 263; *Thompson v. Thompson*, 2 How. (Miss.) 737; *Barker v. Barker*, 2 Gratt. 344; *Anderson v. Thompson*, 11 Leigh, 439; *Summerlin v. Gibson*, 15 Ala. 406; *Perry v. Graham*, 18 Id. 822; *Powell v. Stewart*, 17 Id. 772; 1 Burrill's Law Dict., 2d ed., 686.

What we have said may serve to indicate the origin of the distinction between deeds on the one hand and verbal declarations or unsealed writings on the other, as the means of consummating gifts. Whatever the original reasons for the distinction, it is well established in the common law; and forming, as it does, a rule of property, we are not disposed to disturb it. If asked why we would decide, in the absence of a statute, that land could not be conveyed by an unsealed instrument as well as by deed; or why will not a verbal declaration of gift, without delivery, be effectual to pass the title to personalty—we might find it difficult, at the present day, to give any better answer than this: the law is so settled, and it is only "with trembling hands" (according to the maxim of Montesquieu), that courts should venture to change settled laws.

The writing relied on in this case was executed in Mississippi; and there being no evidence to the contrary before us, we must presume that the rule of the common law prevails in that state.

Whether our legislation has wrought such changes in the principles of the common law as would enable us to hold that a gift of personal property may be made in this state by an unsealed writing, without delivery of the property, we need not inquire, and do not decide.

Judgment affirmed.

VALIDITY OF GIFT OF PERSONALTY: *Sanborn v. Goodhue*, 59 Am. Dec. 398; *Hillebrand v. Brewer*, 55 Id. 757; *Hall v. Howard*, 33 Id. 115.

DELIVERY OF POSSESSION IS ESSENTIAL TO VALIDITY OF GIFT OF CHATTEL, whether made by parol or instrument in writing; and if immediate delivery of possession does not take place, it is not a gift, but a contract: *McWillie v. Van Vacter*, 72 Am. Dec. 127, and see note 135.

PRESUMPTION THAT COMMON LAW PREVAILS IN ANOTHER STATE: *Thompson v. Morrow*, 56 Am. Dec. 318, and note; *Dunn v. Adams*, 35 Id. 42; *Owen v. Boyle*, 32 Id. 143; compare *Blystone v. Burgett*, 68 Id. 658, and note.

THE PRINCIPAL CASE IS CITED to the point that if there remain anything to be done to perfect the gift, or if the donor reserve an interest, or postpone the time of actual enjoyment by the donee, then the title does not pass, and the pretended donee can obtain no relief in any court, in *Walker v. Crews*, 73 Ala. 418; and to the point that a gift by deed delivered is an executed gift, without the actual delivery of the thing given, in Id. 419; and is distinguished in Id. 420.

DELIVERY ESSENTIAL TO VALIDITY OF GIFT OF PERSONAL PROPERTY: *Huddleston v. Huey*, 73 Ala. 215.

COMMON LAW IS PRESUMED TO PREVAIL IN OTHER STATES HAVING COMMON ORIGIN: *Hawley v. Bibb*, 69 Ala. 52; *Snow v. Schomaker Mfg. Co.*, Id. 111; *Danner v. Brewer*, Id. 191; *Reid v. Bank of Mobile*, 70 Id. 199; *Evans v. Covington*, Id. 440; *Irwin v. Bailey*, 72 Id. 467; *Bradley v. Harden*, 73 Id. 70.

EX PARTE MAXWELL.

[87 ALABAMA, 362.]

GRANT OF ADMINISTRATION IS VOIDABLE ONLY, AND NOT VOID, where administrator fails to give bond as required by the order appointing him.

APPLICATION for *mandamus* to compel probate court to grant petitioner, James F. Maxwell, original letters of administration on the estate of his father, James Maxwell, deceased. Letters had previously been granted to Joseph Va Devoort, who, it was claimed, had not given his bond as administrator.

George W. Gayle, for the motion.

By Court, A. J. WALKER, C. J. Without inquiring whether the giving of the bond by Va Devoort would be conclusively presumed, or if it would not, whether the failure to give the bond is shown by the evidence, we dispose of this case by deciding that the failure to give the bond would not render the administration void. The law draws a distinction between administrations which are void and those which are repealable or revocable. The grant of administration is not void, unless there was a want of jurisdiction to make it: *Miller v. Jones*, 26 Ala. 247; *Gayle v. Blackburn*, 1 Stew. 429; *Wales v.*

Willard, 2 Mass. 120. If the court had jurisdiction over the subject-matter of the grant of administration in the absence of a bond, the administration is not void, but simply revocable or voidable. Jurisdiction is the power to hear and determine a cause; and if the court had authority by law to hear and determine upon an application for the administration in the absence of a bond, then the order granting the administration is *coram judice*, and not void: *United States v. Arredondo*, 6 Pet. 709; *State of Rhode Island v. State of Massachusetts*, 12 Id. 719; *Grignon v. Astor*, 2 How. 338.

The giving of the administration bond is not by the law made a condition upon which the court is to hear and determine upon the matter of an application for administration. On the contrary, the giving of the bond by way of qualifying the appointee of the court must necessarily be posterior to the hearing and determination upon the application. The language of the law is: "In all cases, before granting letters of administration, the administrator shall enter into bond," etc.: Clay's Dig. 221, sec. 3. This language clearly implies that there is to be an administrator; that the court is to act upon the application, and designate its appointee before the bond is given. This is still more clearly shown by the condition of the bond, prescribed in the same law as follows: "The condition of the above obligation is such, that whereas the above-bound — has been duly appointed administrator," etc. Thus the very law which requires the giving of a bond before the grant of letters of administration declares, in prescribing the condition of the bond, that an administrator had been before "duly appointed." The intention of the law doubtless is, that the court shall immediately upon announcing its judgment as to the appointment of an administrator, and before issuing letters of administration, and before the administrator performs any official act, require the bond to be given; and this view of the statute, more nearly than any other, gives effect to all its words, and adopts a construction susceptible of practical application.

We admit that it is difficult to reconcile some of the expressions of the opinion in *Cleveland v. Chandler*, 3 Stew. 489, with our conclusion. But the real point in that case was, whether an executor could, under our law, as he might have done under the common law, execute the trust, without obtaining from the proper court the grant of letters testamentary. What is said by the court as to the necessity of the executor's

qualification, by taking the oath, and giving the bond prescribed, was produced as an argument, to show that, under our system, it was necessary that an executor should obtain letters testamentary. It may very well be argued, that to allow an executor to act without the grant of letters testamentary would practically annul the statute requiring bond and oath; and that, therefore, the rule of the common law was changed in this state. But that argument involves no denial of the validity of an order granting administration without the requisite bond and oath. To allow that decision the effect as an authority which is claimed for it would give its expressions an effect not in the mind of the court which made them, and altogether foreign to their purpose. In the case of *Savage v. Benham*, 17 Ala. 119, the validity of an administration was assailed upon the ground that the administratrix was an infant at the time of her appointment, and could not comply with the statutory requisition as to giving bond. The court held that the appointment was, at most, only voidable, and that it could not be declared void in a collateral proceeding. This authority is very much in point, and is entitled to great consideration, because it is made in reference to a similar question.

In the recent case of *Gray v. Cruise*, 36 Ala. 559, the appointment of Brewer, unlike the appointment in this case, was conditional. The order was, that he be appointed administrator on his executing and filing bond. The condition not having been complied with, it was held, not that an appointment actually made was void, but that no appointment was made. Therefore the question decided in that case is totally unlike that which arises in this.

Looking to the decisions in other states, we find the proposition, that an administration under such a law as ours is not absolutely void, well sustained. In *Palmer v. Oakley*, 2 Doug. (Mich.) 433 [47 Am. Dec. 41], it is maintained that a guardianship granted to a *feme covert*, who is incapable of binding herself by contract, would not be collaterally assailable, notwithstanding the law might require that guardians should execute bonds. See also *Russell v. Coffin*, 8 Pick. 143. In New York, the statute required that an administrator should, before receiving letters, execute a bond with two or more sureties; yet it was decided in *Bloom v. Burdick*, 1 Hill (N. Y.), 130 [37 Am. Dec. 299], that an omission in that particular did not render an administration void: *Dayton on Surrogates*, 223;

Ex parte Brown, 2 Bradf. 22; see also *Garrett v. Stump*, 5 Gill & J. 27; *Ray v. Doughty*, 4 Blackf. 115; *Westcott v. Cady*, 5 Johns. Ch. 335 [9 Am. Dec. 306].

The distinction between irregularities which render a judicial proceeding voidable, and the absence of facts which are made conditions precedent, was long since drawn by this court, and has been since steadily maintained: *Wyman v. Campbell*, 6 Port. 219 [31 Am. Dec. 677]; *Matheson v. Hearin*, 29 Ala. 210. The failure to take the proper administration bond is a mere irregularity or error in the proceedings of a court having jurisdiction; and therefore the administration of Joseph Va Devoort was valid until repealed, and the petitioner is not entitled to an original and primary administration upon the estate. If the former administration is terminated by death or resignation, an administration *de bonis non* is the only proper administration.

Motion refused.

VALIDITY OF GRANT OF ADMINISTRATION, GENERALLY.—Two jurisdictional facts must exist to make a grant of administration valid: 1. The death of the party; 2. His residing within the county or leaving assets therein at the time of his death: *Beckett v. Selover*, 68 Am. Dec. 237, and note 257; *Haynes v. Meeks*, 70 Id. 703; *Burnett v. Meadows*, 46 Id. 517; *Van Giesen v. Bridgford*, 18 Hun, 73; S. C. affirmed, 83 N. Y. 348. If the intestate was not an inhabitant of the state at the time of his death, and left no assets in the state, and none came into it afterwards, no jurisdiction is conferred on the court to grant letters of administration in any county of the state, and such letters, if granted, are *coram non judice* and void: *Jeffersonville R. R. Co. v. Swayne*, 26 Ind. 477; *Flinn v. Chase*, 4 Denio, 85; *Langworthy v. Baker*, 23 Ill. 484; *McChord v. Fisher*, 13 Mon. B. 193. But letters of administration granted by the surrogate, showing that the intestate left assets in his county, are held to be conclusive as to his authority to issue them: *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; S. C., 38 Am. Rep. 491; and see *Kelly v. West*, 80 N. Y. 139; *Roderigas v. East River Sav. Inst.*, 63 Id. 460; S. C., 20 Am. Rep. 555. Such letters, being in due form and regular upon their face, confer authority upon the administrator, and cannot be impeached collaterally: *Farley v. McConnell*, 7 Lans. 428; S. C. affirmed, 52 N. Y. 630; and see also *Riser v. Snoddy*, 65 Am. Dec. 740; *Haynes v. Meeks*, 70 Id. 703, and note; *Abbott v. Coburn*, 67 Id. 735; *Driggs v. Abbott*, 65 Id. 214; *People v. Surrogate's Court*, 36 Hun, 218. And it was decided by the court of appeals of New York, that under the statutes of that state, a surrogate had authority to issue letters of administration when he judicially determined that a party was dead, although such party was alive, and that a payment by a debtor of the supposed deceased, made in good faith to the administrator, was valid: *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; S. C., 20 Am. Rep. 555; and see *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1. But in a subsequent decision, in the same case, the same court held that, without due proof of death, the surrogate had no jurisdiction, and the defense of payment to the person holding such letters of administration was overruled: *Roderigas v. East River Sav.*

Inst., 76 N. Y. 316; S. C., 32 Am. Rep. 309; affirming S. C., 11 Jones & S. 217. At common law, the authorities are uniform that letters of administration upon the estate of a person still living are an absolute nullity: *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9; *Jochumssen v. Suffolk Bank*, 3 Allen, 87; *Morgan v. Dodge*, 44 N. H. 259; *Duncan v. Stewart*, 25 Ala. 408; *McPherson v. Cunliff*, 11 Serg. & R. 422; S. C., 14 Am. Dec. 642; and it has been recently held that all proceedings in a court of probate, in administration of the estate of a living person, are void throughout and for all purposes: *Melis v. Simmons*, 45 Wis. 334; and see *Beckett v. Selover*, 68 Am. Dec. 237; *Bolton v. Jacks*, 6 Robt. 190; *Devlin v. Commonwealth*, 101 Pa. St. 273; S. C., 47 Am. Rep. 710. In the case last cited, it is held that "the register's powers are special and limited, and that by statute he has power to issue letters of administration on estates of dead persons only, and not on estates of the living. His decrees are final and conclusive until reversed by a superior tribunal, when, under the statute, he has jurisdiction; but if made without jurisdiction, they are worthless and void, and may be impeached in any collateral proceeding." The case of *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, S. C., 20 Am. Rep. 555, is not regarded as authority: *Devlin v. Commonwealth*, 101 Pa. St. 273; S. C., 47 Am. Rep. 710; and in harmony with this decision of the supreme court of Pennsylvania are the following: *Thomas v. People*, 107 Ill. 517; S. C., 47 Am. Rep. 458; *D'Arusment v. Jones*, 4 Lea, 251; S. C., 40 Am. Rep. 12; *Stephenson v. Superior Court*, 62 Cal. 60. But that letters of administration are conclusive when attacked collaterally, if issued by a court having jurisdiction to grant them, see *Moreland v. Laurence*, 23 Minn. 84; *Pick v. Strong*, 26 Id. 303; *Sullivan v. Foadick*, 10 Hun, 174; *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177; *Bostwick v. Skinner*, 80 Id. 147; *Kennedy v. Ryall*, 67 N. Y. 379; *People v. Surrogate's Court*, 36 Hun, 218.

GIVING OF BOND, AND EFFECT OF FAILURE TO GIVE.—In England, and in the several states of the Union, the person appointed administrator, before letters are issued to him, is required by statute to give bonds with sureties for faithful administration of the estate committed to him: See N. Y. Code Civ. Proc., sec. 2667; Cal. Code Civ. Proc., sec. 1388; *Judge of Probate v. Adams*, 49 N. H. 150; *Miltenberger v. Commonwealth*, 14 Pa. St. 71. And until bond actually given, the office of administrator cannot be regarded as in strictness filled: *Felts v. Clark*, 4 Humph. 79; *Moore v. Ridgeway*, 1 B. Mon. 234; *Pryor v. Downey*, 50 Cal. 388. And it is held that the appointment of a person as administrator by the probate court is not sufficient evidence of his being administrator to entitle him to be made a party to a suit, as such, without proof of his having given the bond and security required: *O'Neal v. Tisdale*, 12 Tex. 40. But the doctrine of the principal case, that failure on the part of a person appointed administrator to execute a bond as required is an irregularity merely, and does not render the appointment void, is sustained by the authorities: See, in addition to cases cited in opinion to principal case, *Cunningham v. Thomas*, 59 Ala. 163, citing principal case; *Mumford v. Hale*, 25 Minn. 347; *Duffin v. Abbott*, 48 Ill. 17. So where the statute required the bond of an administrator to be "approved" by the county judge, it was held that the granting of letters without such approval in form was at most but an irregularity which could be taken advantage of only by appeal from the order: *Cameron v. Cameron*, 15 Wis. 1. Granting letters of administration is a judicial act: *Westcott v. Cady*, 5 Johns. Ch. 334; *Ray v. Doughty*, 4 Blackf. 115; and where the court granting them has jurisdiction, individuals and courts of justice are bound to respect the authority of the letters, and to presume that all the requisite steps have been rightly performed: *Id.*; *Landers*

v. *Stone*, 45 Ind. 404, 410; and see *Flinn v. Chase*, 4 Denio, 90; *Jackson v. Crawford*, 12 Wend. 533; *Farrington v. King*, 1 Bradf. 182; *Hatchett v. Bilinguals*, 65 Ala. 16; *Burke v. Mutch*, 66 Id. 568; *Barchift v. Treece*, 77 Id. 528; *Maybin v. Knighton*, 67 Ga. 103. In Pennsylvania, the statute requires two or more sureties to an administration bond, and if executed by only one surety, the bond is *ipso facto* void: *McWilliams v. Hopkins*, 4 Rawle, 382; and in such case, by the very terms of the statute, the letters of administration are void: *Bradley v. Commonwealth*, 31 Pa. St. 522. And where the statute required the administrator to give bond with surety by persons inhabitants of the state, it was said that "probably the administration would be void if such bond were not given:" *Picquet, Appellant*, 5 Pick. 65, 76. But an administrator's bond which varies from the prescribed form, if voluntarily given, and not made void by statute, is held to be good: *Ordinary v. Cooley*, 30 N. J. L. 179; and compare *Luster v. Middlecoff*, 8 Gratt. 54; *Cohea v. State*, 34 Miss. 179; *Mayor etc. v. Harrison*, 30 N. J. L. 73. In Alabama, an executor's bond with one surety, where the law required two, is not void: *Steele v. Twissler*, 68 Ala. 107; see also *Jones v. Gordon*, 2 Jones Eq. 352. And letters of administration are not void because the seal of the court is not affixed at the particular place indicated in the form prescribed by statute: *Sharp v. Dye*, 64 Cal. 9.

EX PARTE NORTHINGTON.

[87 ALABAMA, 496.]

ADULT PERSON OF UNSOUND MIND IS LIABLE ON IMPLIED CONTRACT FOR NECESSARIES furnished him, suitable to his estate and condition in life. ACTION FOR PRICE OF SUITABLE NECESSARIES FURNISHED TO ADULT PERSON OF UNSOUND MIND must be prosecuted against him personally, where no guardian has been appointed for him.

ADULT PERSON OF NON-SANE MIND, WHEN SUE, MUST BE DEFENDED BY ATTORNEY, to be appointed by the court, if necessary; and if the court refuses to allow the plaintiff to proceed, "unless he first have a guardian appointed by the probate court, and notify such guardian of the pendency of the suit," the supreme court will award a *mandamus*, at plaintiff's instance, to compel the appointment of an attorney for the defendant.

APPLICATION by Northington, as executor of one Fralick, deceased, for a *mandamus* to the circuit court, to compel that court to allow the petitioner to proceed in a cause therein pending, in which the petitioner, as such executor, was plaintiff, and one Williams was defendant. The trial court refused to proceed, on the ground that the defendant was insane and without a guardian, unless plaintiff would first have a guardian appointed by the probate court, and notify such guardian of the pendency of this suit.

Goldthwaite, Rice, and Semple, for the motion.

Watts, Judge, and Jackson, contra.

By Court, STONE, J. That an adult person, who is of unsound mind, can become liable by implied contract for necessities suitable to his estate and condition in life, is a proposition upheld alike by reason and authority: Chit. Con. 131, 132; *Baxter v. Earl of Portsmouth*, 5 Barn. & Cress. 170; *Brown v. Jodrell*, 6 Car. & P. 30; Chit. Med. Jur. 350; *Hallett v. Oakes*, 1 Cush. 296; *Tally v. Tally*, 2 Dev. & B. Eq. 385 [34 Am. Dec. 407]; *Richardson v. Strong*, 13 Ired. 106 [55 Am. Dec. 430]. And at least, where no guardian has been appointed for such adult *non compos*, the suit must, in the nature of things, be prosecuted against him whose estate must pay any judgment that may be recovered: *Kernot v. Norman*, 2 T. R. 390; *Nutt v. Verney*, 4 Id. 120; Chit. Con. 131, 132; Brown on Actions, 301; *Clarke v. Dunham*, 4 Denio, 262; *Walker v. Clay*, 21 Ala. 797.

When suit is brought against a person, not an idiot, but who is of non-sane mind, the rule seems to be universal that he must, if an infant, be defended by guardian; and if an adult, he must be defended by an attorney, to be appointed for the purpose by the court, if necessary. There is no authority for the appointment of a guardian *ad litem*, to defend in such a case as this; and the court should not proceed with the trial without having the defendant represented by an attorney: *Beverly's Case*, 4 Rep. 124; 1 Ch. Pl. 427, 428; Shelford on Lunacy, 512; *Cameron v. Pottinger*, 3 Bibb, 11; *Faulkner v. McClure*, 18 Johns. 134; *Robertson v. Lain*, 19 Wend. 649; 1 Tidd's Pr. 92, 93.

The circuit court did not err in refusing to appoint a guardian *ad litem* for the defendant, nor in refusing to allow the plaintiff to proceed with the proof in his cause, in the absence of counsel for the defendant. But in refusing to allow the plaintiff to proceed, "unless he would first have a guardian appointed by the probate court, and notify such guardian of the pendency of the suit," the circuit court erred. The defendant was an adult, and it was the right of the plaintiff to proceed, after having an attorney appointed for the defendant.

A rule is ordered to the judge presiding in the circuit court of Autauga county, to show cause why a *mandamus* shall not issue to compel the appointment of an attorney for the defendant.

LIABILITY OF INSANE PERSON ON CONTRACT FOR NECESSARIES: *Beale v. See*, 49 Am. Dec. 573; *La Rue v. Gilkyson*, 45 Id. 700; *Richardson v. Strong*, 55 Id. 430, and note 431; *Sims v. McClure*, 70 Id. 196

ACTIONS AND JUDGMENTS AGAINST INSANE PERSONS: *King v. Robinson*, 54 Am. Dec. 614; *Atkinson v. Taylor*, 32 Id. 68, and note 70.

GUARDIANS OF INSANE PERSONS: *Belau v. Lepretre*, 56 Am. Dec. 286; *Davison v. Johnson*, 41 Id. 448.

THE PRINCIPAL CASE IS CITED to the point that a *non compos* may be sued, and that the court should appoint an attorney to make defense for him, in *Medawell v. Holmes*, 40 Ala. 400. It is cited in *Davis v. Tarver*, 65 Id. 102, to the point that a promissory note given by a *non compos* has no legal validity, although its consideration was necessities furnished to him; but although the note is void, the price of such necessities is a legal demand against his estate.

COX v. FOSQUE.

[57 ALABAMA, 506.]

CONTRACT OF AFFREIGHTMENT OBLIGES CARRIER, IN ABSENCE OF LEGAL EXCUSE, to carry the freight to the destined port in the very vessel stipulated in the bill of lading.

TRANSHIPMENT OF FREIGHT, MADE IN ABSENCE OF SUCH NECESSITY AS CONSTITUTES LEGAL EXCUSE, subjects carrier to liability if the freight be lost.

TRANSSHIPPING FREIGHT IS NOT EXCUSED BY FACT THAT STEAMBOAT ON INLAND RIVER IS GROUNDING, where she could relieve herself, with safety and convenience, by temporarily placing a part of her cargo on the bank, and afterwards take it on board again.

ACTION by appellee against appellants, as common carriers, to recover for the loss of two bales of cotton, shipped by plaintiff on board of defendants' steamboat *Eliza Battle*, and never delivered at the port of destination. Defendants pleaded that the cotton was lost by "dangers of the river and of fire," within the meaning of an exception in the bill of lading. The plaintiff's cotton was shipped on board defendants' boat, *Eliza Battle*; the bill of lading contained the usual exception as to "dangers of the river, and fire." The *Eliza Battle*, on her voyage down the river, ran aground, and in order to lighten her, plaintiff's cotton was put on another of defendants' boats. The *Eliza Battle*, after being thus lightened, continued her voyage down the river, without taking back any part of her cargo. The boat to which the cotton was removed afterwards ran aground, and was lightened in like manner, by transferring a part of her cargo to a third boat of defendants. This third boat, including plaintiff's cotton, was afterwards destroyed by accidental fire. Each of the boats had competent officers and a sufficient crew, and neither was overloaded. No question of negligence arose in the case. One of plaintiff's wit-

nesses testified that the cotton could have been landed on the bank from the *Eliza Battle*, when aground, by putting out planks from the boat. The first charge given by the court to the jury appears in the opinion. The court also charged the jury, at plaintiff's request, "that the right of transshipment at the plaintiff's risk did not exist, unless it was necessary to avoid an impending serious damage or loss to the boat and cargo, and there was no other reasonable way of lightening the boat in the power of the captain with his crew, by which such lightening could have been effected, at less risk to the plaintiff than was occasioned to him by such transshipment." Defendants excepted to each of the charges, and they now assign them as error.

George N. Stewart and E. S. Dargan, for appellants.

William Boyles, and R. H. and J. L. Smith, contra.

By Court, A. J. WALKER, C. J. The contract of affreightment obliges the carrier, in the absence of a legal excuse, to carry the freight to the destined port in the very vessel stipulated in the bill of lading. It is a right resulting from the contract that the transportation shall be in the chosen vessel. It is not permissible to speculate as to the reasonableness of the choice. The owner of the freight cannot be questioned as to his reasons. The law allows to him the benefit of the maxim, *Hoc volo, sic jubeo, sit pro ratione voluntas*: *Basin v. Liverpool & Phila. Steamship Co.*, 3 Wall. jun. 229, opinion by Judge Grier; *Garnett v. Willan*, 5 Barn. & Ald. 53-61; *Little v. Semple*, 8 Mo. 99 [40 Am. Dec. 123]. A transshipment of the freight, without a legal excuse, however competent and safe the vessel into which the transfer is made, is a violation of the contract, an infringement of the rights of the freighter, and subjects the carrier to liability if the freight be lost. The transshipment, therefore, of the plaintiff's cotton, of itself rendered the carrier liable for the subsequent loss of the cotton, unless the act of transshipment was legally proper or excusable.

The first charge given by the court announced the proposition that the transshipment was not rendered proper by the grounding of the boat, if by placing the cotton on board upon the bank the boat would have been freed from the grounding, and could afterwards have taken on the cotton, and proceeded on her voyage, and these things could have been done with safety and convenience. The precise question to which this

charge gives rise is, whether a grounded steamboat, upon one of our interior rivers, is justified in transshipping a part of her cargo, when she could with safety and convenience relieve herself by placing it upon the bank, and then take it on and prosecute her voyage to the port of destination? The rule of maritime law is not that the master of a vessel may, at his election, or even when he deems it most politic, transship. The privilege of transshipment is one of necessity. Judge Story says the master "is not at liberty to transport the goods in any other vessel in the course of the voyage, except from mere necessity, when his own ship becomes incapable, by inevitable casualty, from performing it:" Story on Bailments, 564, sec. 562. Chancellor Kent states the same principle in the following language: "In cases of necessity, as where the ship is wrecked, or otherwise disabled in the course of the voyage, and cannot be repaired, or cannot, under the circumstances, be repaired without too great delay and expense, the master may procure any other competent vessel to carry on the cargo, and save his freight:" Kent's Com. 210. And Angell, in his work on carriers, in reference to the same subject, says that if, by reason of stranding, or some other unexpected cause, it becomes impossible to convey the cargo safely to its destination in his own vessel, the master is to do what a prudent man would think most for the benefit of all concerned; and transshipment to the place of destination is the first object, because that is the furtherance of the original object: Angell on Carriers, 188, sec. 187; see also Smith's Mercantile Law, 292; 1 Parsons on Maritime Law, 161, 163, note 2; Abbott on Shipping, 365; *Searle v. Scovell*, 4 Johns. Ch. 222; *Shipton v. Thornton*, 9 Ad. & El. 333; *Crawford v. Williams*, 1 Sneed, 212 [60 Am. Dec. 146]; 1 Arnould on Insurance, 181; *Jordan v. Warren Ins. Co.*, 1 Story, 354; Parsons on Mercantile Law, 348, 349.

It may be that the necessity which would justify a transshipment is not required to be shown with absolute certainty to have existed. That a moral necessity would be sufficient to justify the transshipment seems to be conceded by the authorities. Such a case of moral necessity would exist where the circumstances were such that a master of reasonable prudence and discretion, acting upon the pressure of the occasion, would have made the transshipment, from a firm opinion that unless the transshipment was made, the vessel could not be delivered from the peril at all, or not without the hazard of

an expense utterly disproportionate to her real value: *Brig Sarah Ann*, 2 Sumn. 207; *Gordon v. Mass. M. & F. Ins. Co.*, 2 Pick. 249; *Ship Fortitude*, 3 Sumn. 248; Flanders on Maritime Law, 104, note 2; 1 Parsons on Maritime Law, 60; Parsons on Mercantile Law, 376, note 3. A case of such moral necessity is put by Lord Tenterden as follows: "If on the high seas the ship be in imminent danger of sinking, and another ship, apparently of sufficient ability, be passing by, the master may remove the cargo into such ship; and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss." Abbott on Shipping, 365. But no such case of moral necessity is presented in the facts upon which the court below, in the charge which we are considering, instructed the jury, that the transshipment of the plaintiff's cotton was not justified.

In the case of *Bryant v. Com. Ins. Co.*, 6 Pick. 141, the court sustain the view which we take of the master's duty in this case, in the following language: "The law authorizes the master, in case of shipwreck, stranding, or other disasters which may happen without his fault, to act for all parties interested, in their absence. If the ship should be stranded, it would be his duty, in behalf of the owner of the ship, to get her off and prosecute the voyage, if it could be done at an expense not exceeding half her value. So, if that could not be done, he has authority to procure another ship to carry the cargo to the port of destination. If the cargo were damaged by the stranding, not exceeding one half of the invoice value, it would be the duty of the master, as representing the owner of it, to cause it to be reladen on board of the ship, if that were in a condition to transport it; or if not, on board any other ship which he could procure upon reasonable terms on account of the ship-owner; to the end that the ship-owner may earn his freight, and the merchant may have his goods at the port of destination. The master, in short, is, in such cases, to act reasonably and honestly, with a view to save the property and perform the voyage." The mere stranding of itself does not necessarily produce a necessity for transshipment. Notwithstanding the stranding, it is the master's duty to get the vessel off and prosecute the voyage, if he can do so; and no consideration of mere convenience to him would justify a transshipment.

We do not think the charge given at the instance of the appellee is obnoxious to the objection made especially to it.

The objection is, that it makes the transshipment improper, unless there was no other reasonable way of lightening the boat in the power of the captain, at less risk to the plaintiff than was occasioned by the transshipment; and that the jury were thus made to consider the interest of the plaintiff alone, and not of the boat-owner and all others concerned, in determining whether the transshipment was proper. We do not think the charge is obnoxious to the objection. A way of lightening the boat which would protect the plaintiff at the expense of all others concerned would be unreasonable; and the use of the word "reasonable" in the charge shows that the court did not intend to make the impropriety of the transshipment depend upon the fact that there was another way of lightening the boat, which would produce less risk to the plaintiff, but which would involve a disregard of the interest of all others concerned. If the charge is confused, and tended to mislead the jury, the appellants ought to have protected themselves by asking an explanation at the time. What we have already said in passing upon the first charge will meet the other objections made to the second.

Judgment affirmed.

EFFECT OF RESERVATION OF PRIVILEGE OF RESHIPMENT OF GOODS IN BILL OF LADING: *Carr v. Steamboat Michigan*, 72 Am. Dec. 257, and note 259; *Hatchett v. Steamer Compromise*, 68 Id. 782.

COMMON CARRIER ON RIVER IS ABSOLUTELY LIABLE FOR SAFETY OF GOODS until delivered at specified place to which he has agreed to transport and deliver them: *Cox v. Peterson*, 68 Am. Dec. 145; and see *New Brunswick etc. Co. v. Tiers*, 64 Id. 394; *Moses v. Boston etc. R. R. Co.*, Id. 331.

BELL v. BELL'S ADMINISTRATOR.

[87 ALABAMA, 536.]

WIFE'S POSSESSION OF PERSONALTY, AT COMMON LAW, IS POSSESSION OF HUSBAND, and cannot become antagonistic to his rights. This is so, although it be shown that the husband abandoned the wife when her possession began, and lived in adultery with another woman, and never asserted any claim to the property, and that she held and claimed it as her own individual property, for a continuous period of more than twenty years.

ACTION by administrator of Mrs. Lucy Bell, deceased against William C. Bell, to recover certain slaves, which defendant held and claimed as administrator of George W. Bell, deceased, husband in his life-time of plaintiff's intestate.

The material facts are stated in the head-note. Judgment for plaintiff.

Byrd and Morgan, and L. S. Lude, for the appellant.

D. W. Baine, contra.

By Court, A. J. WALKER, C. J. When this case was before in this court, we announced the principle, applicable to cases governed by the common law, that the wife cannot possess personal property; that her possession is the possession of the husband, and that this principle resulted from the unity of husband and wife. It is not the same principle which applies to the relation of mortgagor and mortgagee, and of landlord and tenant. In those cases, the doctrine that the possession of the one is the possession of the other grows out of the law of estoppel. The possession of the wife is the possession of the husband, because her legal existence is merged in his, and the wife is positively incapable of a possession, in the eye of the law, distinct from that of the husband. From this principle, it is an inevitable deduction that the law deems the husband of Mrs. Bell to have been, through her, in possession of the property in controversy up to his death. This being the case, there was no antagonism of possession on the part of Mrs. Bell to her husband. It is not contended, and indeed, it could not be, either upon authority or reason, that the presumption, which is drawn for the quieting of titles from the lapse of time, is permissible in the absence of any enjoyment of the right asserted antagonistical to that sought to be barred. For these reasons, we think it clear that the possession of Mrs. Bell could never give her a title as against her husband. Suppose it were admitted that the possession of Mrs. Bell, under a claim of title in herself, would vest her with a title; the title, when derived under the common law, would inure to the husband; and thus we would have the wife's antagonistic possession divesting the husband's title, which would, by operation of law, be revested in the husband.

We do not intend, in anything we have said, to infringe the doctrine that in equity the wife is deemed, as to her separate estate, a *feme sole*. It may be that if a wife were in possession of property, claiming openly that it was conveyed to her as a separate estate, so as to exclude the husband's marital rights; and if she had continued to possess and enjoy the property, under such claim of it as a separate estate, for more than twenty years, the law would presume, against the husband,

that the claim was founded on a valid conveyance creating a separate estate. In a court of equity, the wife is allowed to assert her claim to a separate estate in antagonism of her husband's rights. But those principles cannot aid the charge given. It raises the presumption, not upon the fact of the long-continued assertion by Mrs. Bell of a claim that the slaves were conveyed to her as a separate estate, but upon the fact that she was deserted by her husband, and claimed and possessed the slaves "as her own individual property." There is a clear distinction between the claim of a separate estate, created in such a manner as to exclude the husband's marital rights, and a naked claim of title in the wife against the husband. A wife may claim that a separate estate was vested in her. She cannot claim that she holds property in possession adversely to her husband, except upon the ground that it is a separate estate; for her possession, except so far as chancery recognizes her right to hold a separate estate, and confers upon her, in reference to such estate, the privileges of a *feme sole*, is the possession of the husband. The possession by Mrs. Bell, claiming that the slaves belonged to her, and that she held them adversely to her husband, no matter how long, could never avail. An adverse possession, or an antagonistic enjoyment, for twenty years, may create the presumption of a title, in favor of persons *sui juris*. It never can create the presumption of a title in the wife, clothed with the quality of an exclusion of the husband's marital rights. If the absurdity could be conceived of a wife's holding adversely to her husband, what reason or authority is there to support the position that she thereby not only acquired a title, but a title of such a character as to exclude the husband?

There was no evidence conducing to show that Mrs. Bell ever claimed to hold the slaves under any conveyance which created a separate estate. The court, therefore, erred in refusing the charge asked by the defendant, as well as in the charge given.

Reversed and remanded.

HUSBAND'S POWER OVER PERSONALTY: See *Warren v. Brown*, 57 Am. Dec. 194, note; *Burleigh v. Coffin*, 53 Id. 236.

MARITAL RIGHT OF HUSBAND OVER MINOR WIFE'S PERSONAL PROPERTY ATTACHED, even though it be in the possession of the guardian: *Daniel v. Daniel*, 44 Am. Dec. 244.

WHERE HUSBAND COMPELS WIFE WITHOUT HER FAULT TO LIVE SEPARATE FROM HIM permanently, either by abandoning her or forcing her to

leave him, and fails to make suitable provision for her support, she may acquire property, control her person and acquisitions, contract, sue and be sued, in relation to them, as a *feme sole*, during the continuance of such condition: *Love v. Moynahan*, 63 Am. Dec. 306. See also, as to rights of wife abandoned by husband, *Wright v. Hays*, 60 Id. 200, and note 205.

DOUGLASS v. MONTGOMERY ETC. R. R. Co.

[87 ALABAMA, 632.]

NONSUIT WITH BILL OF EXCEPTIONS MAY BE TAKEN, ON MOTION, BEFORE TRIAL IS BEGUN, in consequence of suppression of plaintiff's deposition. PLAINTIFF MAY PROVE CONTENTS AND VALUE OF LOST BAGGAGE BY HIS OWN OATH, in an action against railroad company, as common carrier, to recover damages for the loss of his baggage.

DEPOSITION OF PARTY MAY BE TAKEN, AS IN CASE OF OTHER WITNESSES, when he is competent to testify in his own behalf.

ACTION by appellant against appellee, as common carrier, to recover damages for loss of plaintiff's baggage. When the cause was called for trial, defendant moved to suppress plaintiff's deposition on the grounds: "1. That there is no law authorizing the taking of the deposition of a party plaintiff; and 2. That the plaintiff was not competent to testify in his own favor." Defendant also objected to the taking of the deposition, "on the ground that the law does not authorize the plaintiff to be examined, to prove the correctness of his demand, in a suit against a corporation." Plaintiff then showed that he resided more than one hundred miles distant from the court, and that his deposition had been taken on that account; and stated that he only proposed to read in evidence so much of his deposition as tended to prove the contents and value of his lost baggage, and to make out the rest of his case by evidence *aliunde*. The court sustained defendant's motion, and refused to allow the plaintiff to use any part of his deposition for any purpose. Plaintiff excepted to this ruling, and in consequence thereof, at the next term, took a nonsuit; and he now assigns said ruling as error, and moves to set aside the nonsuit.

W. A. Gunther, for the appellant.

Goldthwaite, Rice, and Semple, contra.

By Court, *STONE, J.* It is urged by appellee that inasmuch as the decision of the circuit court, which is sought to be reviewed, was pronounced on a motion made and heard before

the trial was entered upon, the case is not within the provisions of section 2357 of the code, which applies only to decisions of the court made on the trial of a cause. The argument is not defensible. Section 2353 of the code confers the power of reserving, by bill of exceptions, "any charge, opinion, or decision of the court, which would not otherwise appear of record." Yet this section contains almost the identical words which are found in section 2357. Its language is: "Either of the parties in any civil case, during the trial of the cause, may reserve, by bill of exceptions," etc. If we were to confine the operation of section 2357 to decisions pronounced on the final trial, by the same rule we would be required to limit the operation of section 2353 to charges, opinions, and decisions made during the trial in chief. Yet it is the universal practice, sanctioned by repeated decisions of this court, to reserve by bill of exceptions questions arising on decisions pronounced in the preparatory stages of the suit, provided those decisions bear on the final result; and questions thus reserved are reviewed in this court: *Shepherd v. Spriggs*, 29 Ala. 673; *Peavey v. Burket*, 35 Id. 141. We place the same construction on each cited section of the code, and hold that we will consider of the question.

The main question in this cause has not before been considered in this court. We confess that, whatever rule we may declare, we perceive probable hardship and injustice in its application. Corrupt men may pervert the privilege of being witnesses in their own causes, to their personal profit; while, on the other hand, to deny to a party the right of testifying in a case like the present is almost the equivalent of withholding from the traveling public all remedy for losses of their baggage. As we said on a former occasion, the "result of the introduction of steamboats and railroads is, that common carriers have, to a great extent, taken exclusive possession of the public thoroughfares of the country:" *Steele v. Townsend*, 37 Ala. 247. So we may add, that railroads and steamboats have almost a monopoly of the public travel on their respective routes. The traveler is under a moral necessity to accept the car or the boat's cabin; and it is part and parcel of that necessity that he shall submit his valuables to the care and control of the employees of such public lines of conveyance. To require of a traveler, whose baggage has been lost while in transit on a railroad, that, the loss being established by other testimony, he shall also prove by disinterested witnesses each article of his wardrobe and its value, is simply to declare railroads can-

not be held accountable for their faults and breaches of contract, because of a defect in the law.

We are aware that, in the case of *Snow v. Eastern R. R. Co.*, 12 Met. 44, the supreme court of Massachusetts, in a case like the present, excluded the evidence of the plaintiff; holding that the rule only applied where the defendant, or the employees of the defendant, had been convicted by other evidence of an act of spoliation, or of felony. But the authorities explode this distinction. In a case against a common carrier, before Montague, B, "a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness, *propter necessitatem rei*. For every one did not show what he put in his box:" 12 Vin. Abr. 24, pl. 34. Mr. Greenleaf says: "Such evidence is admitted, not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For where the law can have no force but by the evidence of the person in interest, there the rules of the common law respecting evidence in general are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good than which the nature of the subject presumes none better to be attainable:" 1 Greenl. Ev., sec. 348, and authorities cited. See also Cowen & Hill's Notes to 1 Phill. Ev., 3d ed., 56, 57; and authorities on appellant's brief. We hold that the plaintiff was a competent witness to testify of the contents of his trunk, and the values of the several articles.

Having ascertained that the plaintiff was a competent witness to testify in his own behalf, to the extent to which his testimony was offered, the right existed to take his testimony by deposition, as in case of other witnesses: Code, sec. 2318; *Moore v. Hatfield*, 3 Ala. 442.

Judgment of the circuit court reversed, nonsuit set aside, and cause remanded.

NONSUIT, MOTION FOR, AND ALLOWANCE OF: See *Merchants' Bank v. Rawls*, 50 Am. Dec. 394; *Easterling v. Blythe*, 56 Id. 45; *Mateer v. Brown*, 52 Id. 303; *Conn. etc. R. R. Co. v. Bailey*, 58 Id. 181.

WHEN GUEST SUES INNKEEPER TO RECOVER VALUE OF ARTICLES STOLEN FROM TRUNK, its contents may be proved, in the absence of other proof, by the testimony of the guest; as, from the necessity of the case and nature of the subject, no proof can otherwise be expected: *Pettigrew v. Barnum*, 69 Am. Dec. 212.

ADMISSIBILITY OF DEPOSITION OF WITNESS WHO AFTERWARDS BECOMES PARTY IN INTEREST TO ACTION: *Mulford v. Minch*, 64 Am. Dec. 472.

RAGSDALE v. NORWOOD.

[88 ALABAMA, 21.]

REMAINDER IN PERSONALTY CREATED BY ORAL GIFT is inoperative and void.

TROVER to recover damages for the conversion of a slave named Rebecca. Plaintiffs claimed the slave under verbal gift in remainder to Mrs. Ragsdale, wife of plaintiff, from one E. S. Lewis, her aunt. Defendant claimed title under a purchase from one I. L. Jordan, the father of Mrs. Ragsdale. It was shown in evidence that said Lewis was the owner of a slave named Anaka, and made a verbal gift of her to one Nancy Jordan, to hold for life, and at her death, the slave with her increase to become the property of the children of said I. L. Jordan. The gift was executed by the delivery of the slave to Nancy Jordan, who retained possession until her death, when the slave in dispute, a child of said Anaka, born after the execution of the gift, went into the possession of I. L. Jordan, who held for his children until seven years prior to the commencement of this suit; but the proof as to his possession, and the manner in which he held the slave, was not clear. It was also shown in evidence that Mrs. Ragsdale was the only child of I. L. Jordan at the time that the gift was made and the slave delivered to Nancy Jordan. The jury were instructed that the remainder attempted to be created in the children of I. L. Jordan by said verbal gift was void. Plaintiffs excepted, and now assign this charge as error.

S. W. Cockrell, for the appellants.

F. P. Snedecor, contra.

By Court, *STONE, J.* It was evidently the ancient law, that a remainder in things personal could not be created even by deed. As part of the reason for this, it was said that personal property could not, in any correct sense, "be held for any estate," but was the subject of absolute ownership: See 2 Bla.

Com. 398; Williams on Personal Property, 7, 199, 200, and note; Sugden on Property, 64 Law Lib. 355, 356.

So in America some of the states have held that no remainder in chattels can be created by deed: See *Cutlar v. Spiller*, 2 Hayw. 130; *Gilbert v. Murdock*, Id. 182; *Vass v. Hicks*, 3 Murph. 494; *Sutton v. Hollowell*, 2 Dev. L. 185; *Morrow v. Williams*, 3 Id. 264; *Betty v. Moore*, 1 Dana, 236.

This stern rule has yielded to exceptions in England, and has been generally repudiated on this side of the Atlantic. In this state, it was early settled, and has been steadfastly maintained, that a remainder in things personal can be created by deed; *Catterlin v. Hardy*, 10 Ala. 511; *Shep. Dig.* 536.

The rule we have declared in reference to the perfection of oral gifts is, that the thing must pass from under the power and dominion of one person into the possession, control, and dominion of another, who must be either the donee, or some person who receives the dominion and control for the donee: *Smith v. Wiggins*, 3 Stew. 221; *Sims v. Sims*, 8 Port. 451 [33 Am. Dec. 293]; *McCutchen v. McCutchen*, 9 Id. 656; *Pope v. Randolph*, 13 Ala. 221; *Easley v. Dye*, 14 Id. 166, 167; *Thomas v. De Graffenreid*, 17 Id. 610; *Stallings v. Finch*, 25 Id. 518; *Ivey v. Owens*, 28 Id. 647. Under this principle, it is contended that the gift of the remainder in this case is not perfected because no person has received the dominion and control of the slaves in controversy, for the benefit of those who claim in remainder. Probably this argument is answered by the analogy to that principle, well settled in this court, which asserts that when a legacy is to one for life, with remainder to another, the possession of the life tenant is the possession of the remainderman; and the assent of the executor to the bequest to the first taker is an assent to the gift in remainder: *Magee v. Toland*, 8 Port. 36; *Pitts v. Curtis*, 4 Ala. 350; *Broome v. King*, 10 Id. 819; *Chambers v. Perry*, 17 Id. 726; *Gibson v. Land*, 27 Id. 117; *Walker v. Fenner*, 28 Id. 367; *Thrasher v. Ingram*, 32 Id. 645, 668; 1 Roper on Legacies, 570; *Caines v. Marley*, 2 Yerg. 584.

Although the rigor of the ancient common law, in relation to the creation of remainders in things personal, has yielded much to the spirit of progress observable in our modern jurisprudence, yet we have never held that such remainder can be created by oral gift; and although what is called a sealed instrument has, for many purposes, ceased to be with us distinguishable from unsealed writings, save by the employment

of a rather unmeaning scroll, still we have refused to recognise the validity of a gift of personalty not perfected by delivery, even though the attempted gift be evidenced by writing, unless it be also under the seal of the donor: *Connor v. Trawick*, 37 Ala. 289.

In the case of *Kirkpatrick v. Davidson*, 2 Ga. 302, the supreme court of Georgia said: "The common law has never gone further than to extend the right to create remainders over in personal estate by writing; such were its provisions at the beginning of the revolution, when adopted by this state. The inquiry, then, very naturally presents itself, By what authority can courts take it upon themselves to dispense with this writing? It is not pretended that there is any statute still further extending the common law; and in the absence of such legislation, where the common law stops we must stop. And public policy stands decidedly opposed to a wider departure from the ancient doctrine of the law as to these limitations. If even when evidenced by grant or will they are justly obnoxious to the eloquent strictures of Judge Tucker, what shall we say of them when resting in parol? Slaves and other personal property in the possession of one person, with remainder over to some half-dozen others in succession, to any number of lives in being, and twenty-one years, and the period of gestation after—what inextricable confusion! What a rich harvest of perjury!" See also *Maxwell v. Harrison*, 8 Ga. 61 [52 Am. Dec. 385]; *Fitzhugh v. Anderson*, 2 Hen. & M. 289 [3 Am. Dec. 625]; Keyes on Chattels, sec. 407; *Payne v. Lassiter*, 10 Yerg. 507.

So we think that to allow the creation of a remainder in things personal by oral gift would open a wide door for injustice, fraud, and even for perjury on the part of witnesses. We follow the precedent set us by the supreme court of Georgia, and hold that the remainder attempted to be set up in this case is inoperative and void.

We are not unmindful of the fact that this court has given effect to separate estates of married women in personal property created without writing: See *Crabb v. Thomas*, 25 Ala. 212; *Lockhart v. Cameron*, 29 Id. 355. And we confess that it is somewhat difficult to distinguish in principle between the two classes of cases. Possibly it would shut the door against fraud, if the rule were so changed as to prevent the creation of separate estates without writing. This, however, is a question we are not inclined to consider open in this court.

Without intending to disturb the principle above announced, we are unwilling to enlarge the rule, so as to bring within its influence a class of cases much more numerous, and from which there would probably be reaped a much more abundant harvest of frauds and perjuries.

The judgment of the circuit court is affirmed.

REMAINDER IN SLAVES to take effect and be enjoyed after a life estate cannot be created by parol: *Maxwell v. Harrison*, 52 Am. Dec. 385, and note 389.

BRAGG v. MASSIE'S ADMINISTRATOR.

[38 ALABAMA, 89.]

UPON MARRIAGE, MARITAL RIGHTS OF HUSBAND attach to slave owned by the wife prior to marriage, and upon an exchange of slaves by her during the coverture, in the presence and with the approbation of the husband, his marital rights attach to the slave received in exchange.

WHERE TWO PERSONS ARE IN JOINT POSSESSION of property, the title being in one, the law will refer the possession to him who has the title.

PRIVATE SALE BY ADMINISTRATOR OF SLAVE, the property of his intestate's estate, does not divest the title of the estate, but estops the administrator himself from recovering the property from his vendee.

PRIVATE SALE BY ADMINISTRATOR OF SLAVE, the property of his intestate's estate, perfected by delivery, estops the administrator from relying on the invalidity of the sale, if he subsequently acquires possession; while a subsequent recovery by the purchaser against the administrator does not bar the title of the estate in the slave.

TERMS OF DEED ABSOLUTE ON ITS FACE CANNOT, in a suit at law, be varied by parol so as to make it operative only as a mortgage security.

EVIDENCE OF PART OF CONVERSATION HELD OR ACTS DONE, contemporaneous with an alleged gift, the matter in dispute is admissible as part of the *res gesta*.

THE opinion states the facts.

S. F. Hale and T. H. Herndon, for the appellant.

W. P. Webb, and Brooks and Garrott, contra.

By Court, **STONE, J.** In the questions which are pressed upon our consideration, no contest is raised as to the validity of the gift by William Bragg to his daughter, Mrs. Massie, of the slave Amy; nor of the subsequent exchange of the slave Catherine for Amy. The jury, by their verdict, impliedly affirmed that such gift was made and perfected; and the questions bearing on the merits of this case, which we are called upon to decide, all rest on the postulate that the gift was completely consummated. On any other hypothesis, the

plaintiff's intestate never had title, and the present suit would have failed on that ground; while, on the other hand, the defendant's title would be unquestioned, both by his purchase from William Bragg, and by his recovery of the identical property in controversy in this suit in an action of detinue brought by him against William Bragg. Hence, in considering the questions raised by the charges given and refused, we will regard it as conceded that, at the time of the intermarriage of Ann Eliza with Mr. Massie, she was the owner of the slave Amy, and that subsequently, during the time of her coverture, she, with the approbation of her husband, exchanged Amy for the girl Catherine.

The uncontroverted leading facts of this case, then, are the following: Ann Eliza Bragg was the owner of the slave Amy, and lived with her father, William Bragg, where the slave also lived. She intermarried with Mr. Massie, plaintiff's intestate, with whom she lived also at the house of her father until the death of her husband, which took place only a few months after the marriage. During the life-time of Mr. Massie, Mrs. Massie, in his presence, and with his approbation, exchanged with her father the slave Amy for the slave Catherine. Mr. Massie died in the summer or fall of 1837, intestate. William Bragg was appointed administrator of the estate of Mr. Massie, in November, 1838, and returned an inventory of his effects, omitting all mention of the slave Catherine. William Bragg continued administrator of the estate of Mr. Massie, until August, 1858, when he resigned, and Mr. Davis, the present plaintiff, was appointed administrator *de bonis non*. Mrs. Massie continued to live with her father, William Bragg, except for about one year, which was after her second marriage in 1844. In 1841, between two and three years after he was appointed administrator of Mr. Massie, William Bragg, by private contract, and in his own right, conveyed his property, including the slave Catherine, by deed absolute on its face, to David Bragg and William H. Knott, who thereupon took possession and control of the property, and worked it until about the year 1848; William Bragg and his daughter, Mrs. Massie, returning to the place some few months after the sale, and living upon it with Mr. Knott, who was son-in-law to William Bragg.

In 1842, Catherine was sold at sheriff's sale, as the property of David Bragg and Knott, to satisfy an execution which was the proper debt of William Bragg; was bought in for the

benefit of David Bragg and Knott, and returned to the plantation from which she had been taken, namely, the plantation conveyed by William Bragg to David Bragg and Knott. About the year 1848, David Bragg and Knott made a division of the slaves which had been conveyed to them by William Bragg, and the slave Catherine was allotted to David Bragg. Immediately after this division, David Bragg sent the slaves which had been allotted to him to the place occupied by William Bragg, and they continued with him until 1856, when David Bragg recovered them from him in an action of detinue. There was some proof tending to show that the deed from William Bragg to David Bragg, though absolute on its face was intended and understood as only a mortgage security. There was proof, also, tending to show that William Bragg conveyed the slave Catherine as above stated, in ignorance of any claim which the estate of Mr. Massie had to him; believing at the time that she was the property of Mrs. Massie. There was some proof, also, tending to show that Mrs. Massie, when informed that Catherine had been deeded away, was dissatisfied; and that David Bragg informed her that Catherine should go back to her.

We may state further, that we do not understand the counsel as controverting the proposition that when Ann Eliza intermarried with Mr. Massie, the slave Amy became his property; and that when the exchange of slaves was made, the slave Catherine also became his property. In fact, these seem to be self-evident propositions, there being no evidence in this record that Mr. Massie renounced his marital rights: *Machen v. Machen*, 15 Ala. 373; *Thrasher v. Ingram*, 32 Id. 645; *Machem v. Machem*, 28 Id. 374; *Bell v. Bell*, 37 Id. 536.

Waiving, then, for the present, all question of the consummation of the gift, we will address ourselves to certain points which have been pressed upon our attention as grounds of reversal in this case. The appellant makes the following points:

1. That Mrs. Massie held the slave Catherine adversely to her father, the representative of her husband's estate; that the interest of the estate in the slave Catherine was therefore a mere chose in action, which the administrator had a right to sell at private sale; and that such private sale vested the title in David Bragg and William Knott, the purchasers.

2. That Mrs. Massie held the slave adversely to her father; that she, and those holding under her, have had the uninterrupted adverse possession for more than six years after Wil-

liam Bragg was appointed administrator; and that on this account the claim of the estate is barred.

3. That conceding the private sale by William Bragg to David Bragg and Mr. Knott to have been illegal (that being the only theory on which this suit is maintainable), the sale, under our law, was simply void; that being void when the action of detinue was brought by David Bragg against William Bragg, the latter was not estopped by his sale from resting his defense on the invalidity of the contract; that William Bragg could and should have defended his possession on the title of his intestate; and that the recovery in that action is conclusive against the title of Mr. Massie's estate.

4. That the deed from William Bragg to David Bragg and Mr. Knott was only a mortgage to secure the payment of a debt; that the debt had been extinguished; and therefore William Bragg, by suffering the former recovery, estopped the estate from recovering the property.

In this case, there is no evidence that Mrs. Massie held adversely to her father, William Bragg. The father and daughter lived together, and each exercised some control over the slave. Looking alone to the question of control and dominion, the possession would be pronounced a joint possession. Neither was holding adversely to the other, in that sense which could ripen into a title by mere force of the possession. As conclusive evidence of this fact, we find that the father, while the joint possession continued, sold the slave and delivered the possession to another. This shows that his claim was not a chose in action, and relieves us from the consideration of the question whether, if Mrs. Massie had been holding the slave adversely, the administrator could have made a valid private sale to a third person: See *Woolfork v. Sullivan*, 23 Ala. 548 [58 Am. Dec. 305]; *Bogan v. Camp*, 30 Id. 276. The case is clearly within the principle which holds that, where two persons are in the joint possession of property, the title being in one, the law will refer the possession to him who has the title: *Governor v. Campbell*, 17 Id. 566; *McCoy v. Odom*, 20 Id. 502; *Michan v. Wyatt*, 21 Id. 818.

The sale by William Bragg was a private sale by an administrator, of a slave, the property of his intestate's estate; and under the principle settled in *Pistole v. Street*, 5 Port. 64, the title to the property did not pass out of the estate; but William Bragg estopped himself from recovering the property from his vendee: *Fambro v. Gantt*, 12 Ala. 304; *Lay v. Lawson*, 23 Id. 377; *Wier v. Davis*, 4 Id. 444.

What we have said above disposes of the first and second points made in argument by appellants Mrs. Massie never had the adverse possession.

A full answer to the third point made in argument for the appellant is furnished in the fact that the sale by William Bragg to David Bragg and William Knott was not executory, but executed. It was perfected by delivery; and Messrs. David Bragg and Knott took and retained possession under their purchase. Having subsequently acquired the possession from David Bragg, William Bragg was as much estopped from relying on the invalidity of the sale made by himself as if he himself had been plaintiff suing for the property. The case is not within the principle settled in *Fambro v. Gantt*, 12 Ala. 304, or in *Gunter v. Leckey*, 30 Id. 591. The recovery, in the action of detinue by David Bragg against William Bragg, is no bar to the present suit; for the title here relied on could not have been litigated in that suit.

The fourth point we must also decide against the appellant. In a suit at law, it is not permissible to vary by parol proof the terms of a deed absolute on its face, so as to make it operative only as a mortgage security: *Jones v. Trawick*, 31 Ala. 256; *Parish v. Gates*, 29 Id. 261, and authorities cited.

Tested by the principles above declared, we hold that the circuit court committed no error available to appellant, either in the charges given, or in the charges refused. Those given correspond substantially with the views we have expressed. Of those refused, the first, fourth, and sixth are abstract. The rest do not assert correct legal propositions, and were properly refused.

What was said by the witness William Bragg, in reference to the gift of a slave to his daughter Elmira, related to an act contemporaneous with the alleged gift to Ann Eliza, was part of the *res gestæ*, and was harmless in its character; and we perceive no error in permitting the witness to speak of it. He was testifying of what he had said at the particular time, and this was given by him as a part of the conversation. This, together with certain answers of the witness as to the possession and recognized ownership of the negro girl, before the marriage of Mrs. Massie, all tended to shed light on the question of gift *vel non*, which was a material and controverted question on the trial in the circuit court.

We are not able to perceive any relevancy to the issue in this cause of the fact sought to be proved that the defendant,

David Bragg, held a note against William Massie, which had been presented to William Bragg, the administrator, and not paid. Nor do we perceive any error in the court's ruling, which allowed the witness to state the reasons why he paid taxes on the slave Amy after the gift, and while Ann Eliza was a minor living in his family.

We find no error in the various rulings of the circuit court, and its judgment is consequently affirmed.

RIGHT OF HUSBAND TO WIFE'S PERSONAL PROPERTY, acquired before or during marriage: *Slocumb v. Breedlove*, 28 Am. Dec. 135; *Ewing v. Handley*, 14 Id. 140; *Burleigh v. Coffin*, 53 Id. 236; *Dunham v. Chatham*, 73 Id. 228, and note 235; note to *Warren v. Brown*, 57 Id. 194.

POSSESSION FOLLOWS TITLE where several are in contemporaneous use and occupation of the property: *Wafer v. Pratt*, 36 Am. Dec. 681, note 683; *Mather v. Trinity Church*, 8 Id. 663; note to *Carson v. Burnett*, 30 Id. 154.

UNAUTHORIZED SALE OF PROPERTY BY ADMINISTRATOR of estate is treated as his individual act: *Worthy v. Johnson*, 54 Am. Dec. 393. And an administrator making a void sale is estopped from bringing an action to recover the property sold: *Herron v. Marshall*, 42 Id. 444.

PAROL EVIDENCE IS ADMISSIBLE to show that a conveyance absolute on its face was intended as a mortgage: *Fowler v. Stoneum*, 62 Am. Dec. 490, and note 506; but see *Rockmore v. Davenport*, 65 Id. 132, and note; see also *Pringle v. Kent*, 71 Id. 327, and note 330; *Anding v. Davis*, 77 Id. 658, and note 668.

DECLARATIONS OF PARTY AT TIME ACT is done by him, and explanatory thereof, are admissible as part of the *res gesta*: *Wetmore v. Mell*, 59 Am. Dec. 607; *Barton v. Watson*, 58 Id. 504; *Frink v. Coe*, 61 Id. 141, and notes to these cases.

THE PRINCIPAL CASE IS CITED in *Harris v. Parker*, 41 Ala. 618, to the point that under the Alabama law prior to the adoption of the code of 1852, private sales of the property of decedents, either real or personal, were held to be void when made without order of a court having jurisdiction to order such private sale.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

EADS v. BRAZELTON.

[22 ARKANSAS, 499.]

LAW WILL IMPLY ABANDONMENT OF WRECK, without the positive testimony of an owner of the boat and cargo in affirmation of the fact, where such wreck is covered by an island formed upon it, on which trees have grown to the height of thirty or forty feet, and the owners, after recovering a portion of the cargo, have abandoned the remainder.

FINDER OF WRECK AS SUCH is entitled to the property as owner, or to its possession as salvor, and will be protected from the interference of third persons.

PROPERTY IS ABANDONED WHEN IT IS THROWN AWAY, or is voluntarily forsaken by the owner. It then becomes the property of the first occupant, subject to the superior claim of the owner, except that in salvage cases, by the admiralty law, the finder may retain possession until paid his compensation, or until the property is submitted to legal jurisdiction, for the ascertainment of compensation.

OCCUPATION OR POSSESSION OF PROPERTY LOST, abandoned, or without an owner, as a wreck, must depend upon an actual taking of the property with the intent to reduce it to possession. This possession need not be an absolute or perpetual appropriation of the property to the use of the finder, nor need the act of taking possession be manual; still, marking trees that extend across the wreck, or affixing temporary buoys to it, are not such acts of possession as the law will notice and protect as indicating a desire or intention to appropriate the property.

FINE MAY BE IMPOSED AS PUNISHMENT for contempt in disobeying an injunction, but such fine cannot be inflicted as damages to plaintiff for being obstructed by the defendants in his work after the service of the injunction.

THE opinion states the facts.

Fowler and Stillwell, for the appellant.

Watkins and Gallagher, for the appellee.

By Court, FAIRCHILD, J. When things that become property from being appropriated are the property of nobody, are in a state of negative community, the first finder may reduce them to possession, which is a good claim, and under the name of title by occupancy is regarded as the foundation of all property: 2 Bla. Com. 3, 258; 1 Bouv. Am. Law, 194, No. 491; Pothier Droit de Propriete, Nos. 20, 21; La. Civ. Code, arts. 3375, 3376.

Hence wild animals, that are not property in their natural condition, may be captured, will belong to the first taker by occupancy, and will so belong while in the keeping of the taker, or person claiming under him, or while in domestication: 2 Kent's Com. 348; Coop. Just., lib. 11, tit. 1, sec. 12; 1 Bouv. Am. Law, 194, No. 492; La. Civ. Code, art. 3379.

So the finder of things that have never been appropriated, or that have been abandoned by a former occupant, may take them into his possession as his own property; and the finder of anything casually lost is its rightful occupant against all but the real owner: 1 Bla. Com. 295; 2 Id. 3, 9, 402; 16 Vin. Abr., tit. Possession, F, 3; 1 Domat's Civil Law, by Cushing, 856, No. 2155; Coop. Just., lib. 11, tit. 1, sec. 18; La. Civ. Code, arts. 3383, 3384; Pothier Droit De Propriete, Nos. 58, 60, 267; *Armory v. Delamirie*, 1 Stra. 505; *Brandon v. Huntsville Bank*, 1 Stew. 342, 344 [18 Am. Dec. 48]; *Eastman v. Harris*, 4 La. Ann. 194.

The bill in this case is founded upon a right of occupancy which Brazelton, the plaintiff, insists was vested in him by his discovery of the wreck of the steamboat America, and by his intentions and acts relating thereto. Because this right was not respected by the defendants, partners and servants of a firm of wreckers, doing business in the Mississippi river and its tributaries, under the style of Eads & Nelson, Brazelton filed his bill on the chancery side of the circuit court of Mississippi county, to obtain the protection of the court to relieve him from the interference of the defendants in his own intended labor, to recover the property in the wreck, and to obtain compensation for what they had taken therefrom.

From what is before us, it may be taken as shown in the case, that in November, 1827, the boat named sank in the Mississippi river, within the limits of Mississippi county; that of her cargo, shot and bundles of bar lead of an unascertained quantity, and lead in pigs to about the number of three thousand, remained in the river, wholly abandoned by the owners;

that Brazelton, having information of the place where the boat sank, proceeded, in December, 1854, to ascertain its exact locality in the bed of the river, with the view of raising the sunken lead; that in January, 1855, he arrived at the vicinity of the wreck with his diving-boat, to carry out his intention, and fastened a buoy to a weight that rested upon the wreck, with the expectation of putting his boat over it the next day, but that he was detained by other business, and by the difficulties and dangers of the work in the existing state of water, with boats like his, and by the necessity for making repairs upon his boat and apparatus for raising the cargo, till the defendants, upon the twenty-eighth of September, 1855, caused one of their boats to stop at the shore near the wreck, to search for and find it, to place their boat over it, and to commence raising the lead.

The quantity of lead raised by the defendants was stated in their answer, and applying the price thereto, as shown by the evidence, its value was found to be four thousand five hundred and seven dollars and ninety-six cents, for which sum the court below gave a decree, perpetuated the preliminary injunction which was granted at the beginning of the suit, and which arrested the defendants in their labor upon the lead.

After the injunction had been served, and the defendants, in obedience thereto, had withdrawn their boat from the wreck, and while the plaintiff, in his turn, was engaged in bringing up the lead left by the defendants, they brought their boat back near to the plaintiff's boat and anchored, thereby obstructing his operations, for which two of the defendants that were within the jurisdiction of the court were brought before it for contempt, in disobeying the injunction, and were fined one thousand dollars, which was, by order of the court, paid to the plaintiff for his damages from the obstruction.

The defendants appealed, and contend here that the injunction was illegally granted—for being granted by the judge in vacation—that it was issued against acts for which a legal remedy was the only proper one to be pursued, and upon a case that failed to show a right to the plaintiff to any relief, and that the decree is for a sum too large, in being for the gross value of the lead, without any deduction for the expense of its being raised. Questions are also made upon the testimony.

The foregoing summary, although it may embrace all or the more important of the facts upon which the injunction was obtained, and which must be the grounds of final relief, is in-

tended, as was in effect stated, to be a recapitulation of facts, either admitted or established, and not a statement of allegations that were not proved or were disproved, or of testimony that was insufficient to establish the positions for which it was adduced, or that was neutralized or overthrown by counter-evidence. But as the principal ground of controversy in the case, and one that may supersede all others, is Brazelton's right of occupancy of the wreck by finding, and as that may depend upon its possession, the pleadings which allege and deny the possession, and the facts relative to this issue, may well be subjected to closer scrutiny.

When Brazelton found the wreck, he traced lines to it from different points on the Arkansas side of the river, so that their intersection would show the situation of the wreck, and the lines were indicated by marks upon the trees. It was upon the return of Brazelton from St. Louis with his bell-boat that a float or buoy was placed by Brazelton over the wreck, and this was done with the intention of signifying the place to which the diving-boat was to be dropped the next morning. It was not to be expected that such objects would remain permanent fixtures, as the wreck was in the main channel of the river, and it is evident that Brazelton considered them as guides to the situation of the wreck, as the marked trees were, as he stated to Seth Daniel, in the presence of Reese Bowen, that it would make no difference if they should be washed away, as he could find the wreck from the ranges of his lines. Brazelton does not pretend to have put his boat over the wreck, or to have had any claim to the wreck but by occupancy, which depended upon his finding it, upon his providing means for easy approaches to it by landmarks, and floats upon water, and upon his being in the neighborhood of the wreck from January to the last of September, without any other appropriation of the wreck, but with a continual assertion of his claim, and with the intention of making it good by future action. This, doubtless, he would have done in the winter of 1855, had not the sinking of the steamboat *Eliza* afforded the opportunity of other work, to which he confined himself till June. Then he would have applied himself to the *America*, but the periodical rise of the river at that season prevented him from so doing, and when he was nearly ready, with his boat and machinery in order for effective labor, with favorable water for work, safe from rafts and flat and coal boats, the *Submarine No. 4*, belonging to the defendants,

passed him on the twenty-eighth of September, and within two days was placed over the wreck, and thenceforward the defendants were its occupants in fact, and claimed to be so by right.

If Brazelton's boat had been accompanied with steam-power as was the Submarine No. 4, the rise of the water in June, or the season of floating boats and rafts, would not have been uncontrollable obstructions to his desire to save the lead of the America; and he could, while the boat of the defendants was hovering in the vicinity of the wreck, have placed his own boat over it, and thereby acquired a possession which the custom of the river, as alluded to in this case, would have respected as a right. But it is for us to declare the legal effect of what he did, and not speculate upon the possible result of a different course of action, which he might have pursued had wind and water permitted, and if other business had not called him from the prosecution of his original purpose.

But before examining the law of possession of goods claimed by occupancy, which is the question of the case, two sorts of allegations in the bill may be noticed, which were conceived by the plaintiff to have an effect upon the case, but of which we should need to be convinced, had not the failure of his proofs to sustain the allegations made the effort to convince us unnecessary. They relate to the abandonment or loss of the lead in the river beyond the memory, knowledge, or information of boatmen or residents of Mississippi county; and to the alleged intent of the defendants to overreach the plaintiff in the occupancy of the wreck, and in finding it, to use his marks upon the trees.

Neither the sinking of the America nor its locality seems to have been so obscurely remembered as the bill supposes. Captain Eads, one of the defendants, told the witness, Cunningham, in 1843, according to his recollection, that the America was under the tow-head often mentioned in the case, which the witness afterwards was satisfied to have been the fact, from his acquaintance with the wreck after the tow-head and island were washed away, and the wreck was left in the main river. Cunningham, in 1853, sounded for the wreck, and found it, as he believed. Captain Swan, who was upon the America when she sunk, and who had been familiar with the river at the place of sinking from that time, in 1827 till 1854, and who communicated to Brazelton his information of the situation of the wreck, deposed that the bank has in

all the time mentioned changed but very little, though the bars have been continually changing, and that from marks upon the bank he knew where the America was, and after the island which had covered the wreck about twenty years was washed away, he is of the impression that, from the break of the water where he supposed the America to be, he could upon a clear, bright day have pointed out the situation of the wreck. From the description of the place given by Captain Swan to Brazelton, he was able to find the wreck, as he afterwards told Swan that his supposition that the break in the water was caused by the wreck had been verified. And Captain Swan further said the pilots of the present time were as well advised, as a matter of news, of the loss of the America in the vicinity where the wreck lay, as the pilots were when she was sunk.

Josiah Sellers, who was a steamboatman at the time the America was lost, and who passed the wreck a few days after her loss, and who both in going down and returning up the river stopped at the wreck, made such observations that when the bar was washed away that had protected the shore and hid the wreck, he was satisfied that the America was in the channel of the river, and that the ruffling of the water, which he and Captain Swan saw in the river at that point was caused by the wreck of the America. And he informed Captain Eads in 1853 or 1854, and he believes in both of these years, of the situation of the wreck, giving him the landmarks and the break of the water as indications where to find it, as did Swan to Brazelton.

So in February, 1855, Captain Turner found the wreck, and he says without the assistance of Brazelton's marks.

The witness Garrett also referred William H. Johnson to negroes who were probably living on the river when the boat was sunk, and Captain Neaves of the Submarine No. 4 almost admits that the information given him by negroes that stood upon the bank when he was searching the water for the wreck hastened its finding.

From these facts, and from everything in the case, we think there could have been but little difficulty in finding the wreck after the island that had so long concealed it was washed away, and the labor or good fortune of Brazelton in ascertaining its locality affords no reason for assigning it to him as his property, aside from the legal consequences of its possession, even if courts had the power of such assignment, which we

disclaim, and which we do not understand Brazelton to claim but by implication.

With reference to the tree-marks of Brazelton, it may be said that there is no satisfactory evidence that they were used on the part of the defendants in finding the wreck.

Andrew Skelton says that one of the divers of the defendants showed him marks upon trees, but what or whose marks, we do not know. George Young relates that, the morning after the boat landed near the wreck, the captain hired a negro to show him Brazelton's marks; while Johnson Reeves says that on the same morning the captain offered the negro money to show him where the wreck lay. The language of the captain to the negro, if the two witnesses were testifying to the same conversation, was very differently understood by them, and we have no means of testing their comparative correctness.

Captain Neaves, in his answer, denies this, and Johnson, a diver, who seems to be most implicated in the talk on shore at Garrett's, and with Young, and who was referred to the negroes, positively denies that he knew of Brazelton having made any marks, or being in the vicinity; asserts that he was on shore looking for marks, he said and supposed Turner to have made. He, Turner, had found the wreck while in the employ of the defendants, and had made a chart, which is alluded to in the case as a guide to the boat in finding the wreck.

The evidence, too, is abundant that the defendants, or Captain Eads, one of them, had knowledge of the place of the wreck, and they aver a persistent intention to have taken up the lead, which the allegations of the bill against them, as being extensive, determined, and monopolizing wreckers and the deposition of Turner confirm.

It is not established that the defendants knew that Brazelton was about to work upon the *America*, although a witness so inferred from the conversation of the captain and others of the boat; while there is no room for suspicion that they intended to interfere with any occupancy of the boat by Brazelton; and the whole case is, that they did not do so, according to their understanding of Brazelton's right.

But what that right was remains to be determined.

Notwithstanding the point made by the defendant, that Brazelton had no right to the lead which the law would protect, it being the property of the original owners of the cargo, there is no room for doubt that the lead was abandoned by its own-

ers; and even without the positive testimony of an owner of the boat and cargo in affirmation of the fact, the law would so imply from the term of the loss, and from the fact of its having been covered by an island formed upon it, which sustained trees grown to the height of thirty or forty feet. All reasonable hope of acquiring the property must have been given up from the nature of the case; and the evidence shows that during the two years that intervened between the sinking of the boat and its being covered by the tow-head and island, no effort was made or design entertained to save that part of the cargo that was abandoned when the high water interrupted the labor of saving it, that was prosecuted for two weeks after the loss of the boat, save that an excluded deposition mentions that one hundred and sixteen pigs of lead were afterwards got out by residents of the neighborhood. Having saved the specie that was on board belonging to the United States, the furs and one half of the six hundred pigs of lead, and a part of the shot, with which articles the boat was laden, and the boilers and machinery of the boat, the owners of the *America* seem to have contented themselves therewith; and to have wholly abandoned the remaining shot and lead.

Unlike *The Barefoot*, 1 Eng. L. & Eq. 664, which was the loss of lead and iron in smacks, in which Dr. Lushington held that the property was left but not abandoned, because the place of the property was well known, and because the property was unmovable until recovered by human skill, this case, from the length of time that had passed, from the shifting nature of the bars and channel of the river in Plumb point bend, as well as from the testimony of captains Swan and Sellers, of William H. Johnson, and of Mr. Ruble, an owner of the boat, shows not only that the lead in the wreck was left, but that it was abandoned. But whether the property, when saved, would have been the property of Brazelton, or of an occupant, or of the owner, would not give right to the defendants to resist the suit of Brazelton; for if he were a finder of the wreck, as such he would be entitled to the property as owner, or to its possession as salvor, and would be protected from the interference of the defendants or other persons. And for this reason, decisions in admiralty upon the conflicting claims of salvors to the possession of deserted property are authorities to be considered in the settlement of the pending controversy.

Property is said to be abandoned when it is thrown away, or

its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or when it is involuntarily lost or left without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner; except that, in salvage cases, by the admiralty law, the finder may hold possession until he is paid his compensation, or till the property is submitted to legal jurisdiction for the ascertainment of the compensation: 2 Bla. Com. 9; 1 Bouv. Am. Law, 195, No. 494; Coop. Just., lib. 11, tit. 1, sec. 46; Abbott on Shipping, 555, Am. note; Woolrych on Waters, 15; *Rowe v. The Brig*, 1 Mason, 373; *Lewis v. The Elizabeth and Jane*, 1 Ware, 43; *The Bee*, Id. 344, 345; *Wilkie v. Brig St. Petre*, Bee Adm. 82; *The Mary*, 2 Wheat. 126, and note *a*; *Steamboat T.P. Leathers*, Newb. Adm. 425; Marvin on Wreck and Salvage, secs. 124, 125.

Some authorities refer to things found at sea as belonging to the finder, in distinction from wreck, that is, goods lost at sea and floated to land, or in general terms excluding the sense of derelict as used in maritime cases, or as distinguished from custom and statutory law; and in extreme cases property wholly derelict and abandoned has been held to belong to the finder against the former owner: Woolrych on Waters, 14; *Constable's Case*, 5 Co. 108 b; Marvin on Wreck and Salvage, sec. 131, note; 1 Bouv. Am. Law, 196, No. 496; *Wyman v. Hurlburt*, 12 Ohio, 87 [40 Am. Dec. 461].

The occupation or possession of property lost, abandoned, or without an owner must depend upon an actual taking of the property, and with the intent to reduce it to possession. The intent may not be that this possession shall be an absolute or perpetual appropriation of the property to the use of the finder: it may be subject to the claim of the real owner, the possession may be taken for his exclusive good, or it may be taken as a means of subsistence or accumulation, according to the course of business of the parties to this suit. But in any case, title by occupancy must rest upon intentional, actual possession of the thing occupied.

Such is the meaning of the commentaries, from which are the following extracts:

"The acquisition of things tangible by occupancy must be made *corpore et animo*; that is, by an outward act signifying an intention to possess. The necessity of an outward act to commence holding a thing in dominion is founded on the principle that a will or intention cannot have legal effect, with-

out an outward act declaring that intention; and on the other hand, no man can be said to have the dominion over a thing which he has no intention of possessing as his. Therefore, a man cannot deprive others of their right to take possession of vacant property by merely considering it as his, without actually appropriating it to himself; and if he possesses it without any will of appropriating it to himself, as in the case of an idiot, it cannot be considered as having ceased to be *res nullius*. The outward act or possession need not, however, be manual; for any species of possession, or as the ancients expressed it, *custodia*, is in general a sufficient appropriation:" 1 Bouv. Am. Law, No. 495. Possession in the civil law "implies three things; a just cause of possessing as master, the intention to possess in this quality, and detention. . . . Without the intention there is no possession. . . . Without the detention, the intention is useless, and does not make the possession:" 1 Domat's Civil Law, by Cushing, 859, No. 2161. "The possession of the things which we acquire by their falling into our hands, such as that which we find, . . . is acquired by the bare fact of our laying our hands upon them:" Id., No. 2162. "Found means not merely discovered, but taken up:" Notes to Coop. Just. 458. "Treasures naturally belong to the finder; that is, to him who moves them from the place where they are, and secures them:" Id. 461.

The law is happily stated in the code of Louisiana thus: "To be able to acquire possession of a property, two distinct things are requisite: 1. The intention of possessing as owner; 2. The corporeal possession of the thing:" La. Civ. Code, art. 3399.

Pothier, with his characteristic accuracy and perspicuity, has fully stated the law upon this subject, and the rule as stated by him is to this effect: that to acquire possession of a thing, there must be a desire to possess it, joined to a prehension of the thing: See in full Nos. 39-42 and No. 55 of his *Traite de Louisiana, Possession*, and Nos. 63 and 64 of his *Traite du Droit de Propriete*; Marvin on Wreck and Salvage, sec. 127.

Such are the doctrines of the Louisiana code, of the commentators upon the common, Roman, French, and admiralty law; and applying them to the facts of this case, we hold that Brazelton never attained to the possession of the wreck of the *America*; that he therefore had no title to it by occupancy; had no right upon which judicial protection could operate; none which the court below should have recognized. He had

considered the wreck as his as its finder, but had not actually appropriated it to himself; his intention to possess was useless without detention of the property; he had not found the lead in the acquired sense of discovering it and taking it up; he was not a finder, in that he had not moved the wrecked property, or secured it; he had the intention of possessing it as owner, but did not acquire its corporeal possession; to his desire to possess, there was not joined a prehension of the thing.

Brazelton's act of possession need not have been manual; he was not obliged to take the wreck or the lead between his hands, he might take such possession of them as their nature and situation permitted; but that his circumstances should give a legal character to his acts, making that to be possession which the law declares not to be possession, assumes more than a court can sanction. Marking trees that extended across the wreck, affixing temporary buoys to it, were not acts of possession; they only indicated Brazelton's desire or intention to appropriate the property. Placing his boat over the wreck, with the means to raise its valuables, and with persistent efforts directed to raising the lead, would have been keeping the only effectual guard over it, would have been the only warning that intruders, that is, other longing occupants would be obliged to regard, would have been such acts of possession as the law would notice and protect. If Brazelton, in the winter of 1855, deferred raising the lead to wreck the steamboat *Eliza*, he was free to do so, but must abide the legal consequences of his choice. If afterwards he could not work in the main channel of the river, owing to high water, strong wind, or to damaged boats and rigging, his ill fortune could not bend the law to his circumstances, nor could he with right warn off the defendants from the occupancy of the *America*, when they were as willing and more able than himself to raise the lead in her hold.

The following adjudged cases may have a bearing upon this case, and illustrate the general principles of the last-cited authorities:

In *Pierson v. Post*, 3 Cai. 175 [2 Am. Dec. 264], the plaintiff was pursuing a fox and had not got it within his control; and the defendant was held not to be liable for killing it. The plaintiff had established no claim by occupancy. His intention against the fox was unmistakable, but his act of possession was incomplete.

Marking a bee-tree was a more emphatic claim against the

bees than Brazelton's marks were upon the wreck, but was not sufficient to vest a right in the finder: *Gillet v. Mason*, 7 Johns. 17.

And when one had found bees, and had got leave of the owner of the tree in which they were to cut it and take the bees, he acquired no property in the bees: he had not taken possession of them: *Ferguson v. Miller*, 1 Cow. 244 [13 Am. Dec. 519].

It is not trespass to take wild bees or honey: *Wallis v. Mease*, 3 Binn. 553.

A deer had been wounded and followed with dogs for six miles, and the pursuit was given over for the night by the plaintiff, though his dogs continued the chase; the defendant and the plaintiff seized the deer together, but because this did not show an occupancy of the deer by the plaintiff, he could not recover the skin and venison of the defendant, who killed the deer: *Buster v. Newkirk*, 20 Johns. 75.

The next authority is from an accomplished admiralty judge, several of whose decisions are cited in this opinion: "The title which is acquired to property by finding is a species of occupation; and it is laid down as a rule of law, by the civilians, that the mere discovery and sight of the thing is not sufficient to vest in the finder a right of property in the thing found: Pothier *Traite de la Propriete*, No. 63. His title is acquired by possession, and this must be an actual possession. He cannot take and keep possession by an act of the will, *oculis et affectu*, as he may when property is transferred by consent and the possession given by a symbolical delivery. To consummate his title, there must be a corporeal prehension of the thing:" *The Amethyst*, Davies, 23.

From the foregoing quotation may be seen the inapplicability of the citation from Parsons on Mercantile Law, in the argument for Brazelton, as it relates to the delivery of bulky articles, the right of which is passed by sale.

The reference to the next case, except the extract from the opinion of the chancellor, is taken from the printed brief furnished for the defendant.

The case of *Deklyn v. Davis*, Hopk. 135, is like the present case. About the year 1781, the British frigate The Hussar sank in the East river in sixty or seventy feet of water.

The bill averred that she "was abandoned and derelict," and that, "with much labor and expense," the complainants, in the summer of 1823, had discovered the "precise situation

of the ship, had fastened chains around her, which they secured to floating timbers, and raised her about ten feet from her bed, and perfectly occupied the vessel, and continued their occupancy, by which she became their property; that at the approach of winter, they desisted from their labors, by reason of the weather, designing to resume the work in the following season; that the occupancy of the complainants continued until the defendants, with knowledge of complainants' rights, on the twenty-second of March, with vessel, etc., moored and anchored over and around the sunken ship." An injunction was granted restraining the defendants "from the further interruption of the complainants," and also enjoining them "forthwith to remove the sloops."

"The defendants set up that the property was not abandoned or derelict when complainants took possession in 1823; that defendants, at great cost, had made preparation to raise the vessel; that they had "ascertained the precise situation and position of said frigate, took possession thereof, and to occupy the same made their marks and ranges on the adjoining shore, so as to identify the spot and enable them to commence their operations thereupon at the opening of the following season;" that the complainants, "in the absence of the defendants and their men, fraudulently and forcibly took possession of the frigate;" and afterwards, Davis, in the absence of Deklyn and his men, took possession of the frigate by anchoring sloops over her and surrounding her with machinery. "The right claimed by each of the contending parties is the right of occupancy. Both parties have prepared means and have taken measures to raise the sunken frigate; neither party has yet effected that object; and such being the state of the facts, the court says: 'Neither party has yet obtained an actual or exclusive possession of the derelict subject. . . . The complainants allege in their bill that their acts of occupancy have obtained for them a title; and the defendants, by their answer, insist that their acts, preparatory to an actual possession, have been such as to give them a prior and superior right.'"

But if the acts of the complainant Deklyn did not constitute any "actual or exclusive occupancy," and if the acts of the defendant Davis were merely "preparatory to an actual possession," much less did the acts of Brazelton constitute such occupancy: *Deklyn v. Davis*, Hopk. 135.

The next two cases referred to, and from one of which a

lengthy extract is given, were decided by Judge Betts of New York, a very high authority in the matters treated upon; "but it is in consonance with the established principles of maritime law to hold those beginning a salvage service, and who are in the successful prosecution of it, entitled to be regarded as the meritorious salvors of whatever is preserved, and entitled to the sole possession of the property:" *The Brig John Gilpin*, Olc. 86.

"An impression seems to have obtained that one who finds derelict property under water or afloat acquires a right to it by discovery, which can be maintained by a kind of continued claim, without keeping it in possession or applying constant exertions for its preservation and rescue. There is no foundation for such notion. The right of a salvor results from the fact that he has held in actual possession, or has kept near what was lost or abandoned by the owner, or placed in a dangerous exposure to destruction, with the means at command to preserve and save it, and that he is actually employing those means to that end.

"The finder thus becomes the legal possessor, and acquires a privilege against the property for his salvage services which takes precedence of all other title:" *Lewis v. The Elizabeth and Jane*, Ware, 41; *The Bee*, Id. 332; *Wilkie v. Brig St. Petre*, Bee, 82. "The fact that property is found at sea or on the coast in peril, without the presence of any one to protect it, gives the finder a right to take it in his possession; and the law connects with such right the obligation to use the means he has at control, and with all reasonable promptitude, to save it for the owner. He can therefore be no otherwise clothed with the character of salvor than whilst he is in the occupancy of the property, and employing the necessary means for saving it.

"Notorious possession, with the avowal of the object of such possession, are cardinal requisites to the creation or maintenance of the privileges of a salvor; where they do not exist, any other person may take the property with all the advantages of the first finder:" *Schooner John Wurts*, Olc. 469-471; *Marvin on Wreck and Salvage*, sec. 128.

No reasoning, no comment, can make more imperative the action of this court than it is made by the foregoing cases and authorities, taken in connection with the facts of the case, or with the allegations of the bill alone.

The decree of the circuit court of Mississippi county sitting in chancery is reversed; and the case must be sent down with

instructions for the dissolution of the injunction, and that a decree be entered for the recovery of the thousand dollars, with interest, that were assigned to Brazelton as his damages for being obstructed by the defendants in his work upon the wreck after the service of the injunction upon the defendants Patrick & Neaves.

If the fine inflicted had been considered in the court below, and had been a punishment for the contempt of the two defendants' disobedience to the process of the court, a different decree would have been called for upon this branch of the case.

The defendants below, the appellants here, must recover their costs in this court, but to show our disapprobation of the conduct of defendants Patrick & Neaves, in disregarding the process of the court, we direct that the costs in the court below be paid by them.

ABANDONMENT, WHAT NECESSARY TO CONSTITUTE: *Wyman v. Harburt*, 40 Am. Dec. 461, and extended note 464 et seq., discussing the questions arising in the principal case.

WRECK, PROPERTY IN.—Right of owner to reclaim, and salvor's lien on; See note to *Forster v. Juniata Bridge Co.*, 55 Am. Dec. 508-512.

SALVAGE, RIGHT TO: See *Baker v. Hoag*, 59 Am. Dec. 431, and note 437.

ASHBY v. JOHNSTON.

[23 ARKANSAS, 162.]

SURETIES ON BOND ARE NOT DISCHARGED, where from the mere omission of the obligee to probate a claim in time, the cause of action is barred against the estate of the principal, in the hands of his executor or administrator, by the statute of non-claim—this statute being in its nature but a statute of limitation.

THE opinion states the facts.

Garland and Randolph, for the appellants.

Flanagin, for the appellees.

By Court, ENGLISH, C. J. This was an action on a guardian's bond. The suit was brought by Albert G. and George W. Johnston (survivors of Philip H. Johnston, deceased), for whose benefit the bond was executed, whilst they were minors, against John W. Ashby and Thomas A. Heard, the sureties in the bond; the principal, Albert G. Johnston, and guardian of the plaintiffs, having departed this life before suit.

The defendants interposed a plea in bar, alleging, in sub-

stance, that after the accrual of the cause of action, the principal in the bond died, leaving a will, and his executors declining to qualify, letters of administration, with the will annexed, were granted by the probate court to one Singleton; and that the plaintiffs did not, at any time within two years after grant of letters, present their demand, properly authenticated, to the administrator for allowance, etc., whereby the demand against the estate was barred, and the defendants discharged.

A demurrer was sustained to the plea, the defendants rested, final judgment was given against them, an inquest of damages, and they appealed.

The appellants insist that the cause of action upon the bond against the principal being barred by the statute of non-claim, by reason of the failure of the plaintiffs to probate the claim against his estate within the time prescribed by the statute, they, as sureties in the bond, are also discharged; and they rely on the case of *State Bank v. Fowler*, 22 Ark. 112.

But the case cited does not sustain the defense set up in the plea. There, on *scire facias* to revive a judgment, Fowler, the principal, was discharged on plea of payment, and the bank afterwards undertook to open the judgment by bill in chancery, on the ground that the plea was false; and failing as to Fowler, and the judgment remaining in force as to him, this court held that Pike, the surety, was also discharged; that when the principal is discharged on a plea not personal to himself, as upon a plea of payment, etc., the surety was also discharged, because, if he paid the debt, he had no remedy over against the principal.

But it is well settled that where, from mere omission of the obligee to probate the claim in time, the cause of action is barred against the estate of the principal, in the hands of his executor or administrator, by the statute of non-claim, this of itself does not discharge the sureties in the bond, the statute being in its nature but a statute of limitation: See *Johnson v. Planters' Bank*, 4 Smed. & M. 171 [43 Am. Dec. 480]; *Cohea v. Commissioners of Sinking Fund*, 7 Id. 441; *Marshall v. Hudson*, 9 Yerg. 63; *McBroom v. Governor*, 6 Port. 33; *Cawthorne v. Weisinger*, 6 Ala. 716.

The appellants might have paid the demand, and caused the claim to be allowed against the estate of the principal in their favor, or they might have compelled the appellees to probate the claim, within the time prescribed by the statute: *Id.*

It has been held that where sureties are compelled to pay the debt for the principal after the administration upon his estate has been closed, they have the right to subject his estate in the hands of his legatees or distributees to the satisfaction of the amount paid by them. But this question is not before us now.

The judgment must be affirmed.

SURETY IS NOT DISCHARGED by mere delay in suing principal: See notes to *People v. Jansen*, 5 Am. Dec. 279; *Cope v. Smith*, 11 Id. 589; *Hunt v. Bridgman*, 13 Id. 461; see also *Carter v. Jones*, 49 Id. 425; *Marberger v. Pott*, 55 Id. 479; *Cook v. Southwick*, 60 Id. 181; but see *Dickerson v. Board of Commissioners of Ripley Co.*, 63 Id. 373, and note 380.

FAILURE OF CREDITOR TO PRESENT HIS CLAIM against the estate of a deceased principal does not release the surety: Note *Cope v. Smith*, 11 Am. Dec. 589, and note 590, citing the principal case.

CHRISTIAN v. GREENWOOD.

[23 ARKANSAS, 253.]

WHERE DEBTOR'S SALE OF PROPERTY IS FRAUDULENT as to creditors, the purchaser cannot be affected by the debtor's fraud, unless he participated in it by assisting the former to put his property out of the reach of his creditors, and appropriating it to himself with a knowledge of the debtor's fraudulent design, and with intent to further the accomplishment of such design.

DEBTOR MAY PREFER AND SECURE CREDITOR by a voluntary sale to him of his property, although the preferred creditor knew that the debtor's object in making the sale was to deprive the other creditors of the means of collecting their debts. In such case, the preferred creditor's conduct would not be held fraudulent, as it would be presumed that he acted to secure himself, and not to defraud the other creditors.

CREDITOR BUYING PROPERTY OF INSOLVENT DEBTOR to secure his own demand has the same equity that other creditors have. Each has an equitable interest in the debtor's property; and the legal title conjoined to an equity will overcome a mere equitable interest; but the buyer must allow a fair price for the property, and must not buy more than is necessary for his own protection.

WHERE DEBTOR'S SALE IS FRAUDULENT AS TO OTHER CREDITORS, a purchasing creditor will be held to a participator in the fraud, if he have notice of it, and still deal with him, thereby affording him the means to make his fraudulent efforts against his creditors successful; and this, notwithstanding he may have paid a full price for the property.

GRANTEE WHO HAS KNOWLEDGE OF FRAUD of his grantor is held responsible for it to the extent of his dealing with him, and a fraudulent intent will be presumed on the part of the grantee, as well as against the grantor.

THE opinion states the facts.

Johnston, for the appellant.

Waddell, for the appellees.

By Court, FAIRCHILD, J. On the fourth of February, 1856, Christian purchased of Cecilius J. Hundley, two negroes—Ned and Fanny. At the time of the purchase, the negroes were not in Ashley county, the place of Hundley's residence, but were in Louisiana, where they and the other negroes of Hundley had been taken to avoid their subjection to the payment of the debts of Hundley to the appellees, Greenwood & Co. Immediately upon the purchase, the negroes were brought back to Ashley county, Ned went into the possession of Christian. Fanny returned to the employment and house of Hundley, but under hire from Christian, and they thus remained, till in September, 1856, they were levied upon as Hundley's property, in pursuance of directions from the appellees, to satisfy executions which they had sued out against him on judgments obtained in the circuit court of Ashley county. To prevent the sale of the negroes under these executions, Christian filed his bill against the appellees, alleging that the negroes were his, and not subject to be applied to the payment of Hundley's debts; he having bought them when there was no lien upon them, in perfect good faith, and upon the payment of a fair and full consideration. An injunction, according to the prayer of the bill, was granted.

The answers of the appellees tender an issue as to the ownership of the negroes; the appellees maintaining them to be subject to the satisfaction of their executions against Hundley, as their alleged purchase by Christian was a feigned transaction, made to assist Hundley to defraud the appellees out of the demands represented by the executions.

There are other allegations in the pleadings: in the bill, to show the propriety of the application for an injunction; and in the answers denying this upon the want of jurisdiction of chancery, and alleging facts tending to make good the main defense of fraudulent dealing between Christian and Hundley; but we shall notice only the principal point in the case, because the consideration of that is conclusive of the whole case, and because it is well settled that, if the bill be true, it presents a proper case for the relief for which it asks: *Sanders v. Sanders*, 20 Ark. 612, 614.

Upon the final hearing of the case, the circuit court of Ashley county, sitting in chancery, dismissed the bill, and Christian appealed.

The sale of the negroes to Christian was fraudulent on the part of Hundley, and was made by him to defraud the appellees, and out of these very debts that are mentioned in the pleadings.

But Christian cannot be affected by Hundley's fraud, unless he participated in it by assisting Hundley to put his property out of the reach of the appellees, and appropriating it to himself with a knowledge of Hundley's fraudulent design, and with intent to further the accomplishment of such design: *Dardenne v. Hardwick*, 9 Ark. 486; *Splawn v. Martin*, 17 Id. 152; *Hempstead v. Johnston*, 18 Id. 141 [65 Am. Dec. 458]; *Ewing v. Runkle*, 20 Ill. 463.

The argument that Christian had the same right as the appellees to secure his own debt against Hundley is good if applicable. If Hundley was owing Christian, he might secure the debt by a voluntary sale from Hundley of his property, as well as the appellees could procure the payment of their demands by the compulsory sale of Hundley's property under execution. And this would be so, though Christian knew that Hundley's object in making the sale was to deprive the appellees of the means of making their debts. On the part of Hundley, the effect of such sale to Christian would be but preferring one creditor to others, which the law tolerates, and on the part of Christian, it would only be endeavoring to do by contract what the appellees were doing by law, each trying to secure his own interest: *Pearson v. Rockhill*, 4 B. Mon. 299.

In such a case, Christian's conduct would not be held fraudulent, as the law would presume that he acted, not to defraud other creditors of Hundley, but to secure himself: *Sigler v. Knox Co. Bank*, 8 Ohio St. 516; *Ford v. Williams*, 3 B. Mon. 557.

A creditor, buying the property of an insolvent debtor to secure his own demand, has the same equity that other creditors have; each has an equitable interest in the debtor's property; and the legal title, conjoined to an equity, will overcome a mere equitable interest: *Scymour v. Wilson*, 19 N. Y. 421, 418. Although the law will not restrict a creditor from buying enough property, from a failing or fraudulent debtor, to pay the whole debt, or from buying all the debtor's property, and applying it to the extinguishment of the debt, as far as it will go, the buyer must allow a fair price for the property, and must not buy more than is necessary for his own protection: *Ford v. Williams*, 3 B. Mon. 557. We do not intimate that the value of the property bought must be less, or must be no more,

than the debt to which it is applied, but it would be a suspicious fact that the purchase should include parcels of property, one piece of which would pay the debt; and the cause for suspicion would be increased if the overplus should be paid in money, or with a consideration that would be invisible to other creditors.

In a case where the price of the property bought was nine hundred dollars, and the debt on which it was bought was six hundred and sixty dollars, the court of appeals of Kentucky upheld the sale, notwithstanding the excess of two hundred and forty dollars was paid in money, and was not shown to have been paid on debts of the insolvent seller of the property, because the property, being that of a female slave and two infant children, was not such as the law or good conscience required to be separated, and because a fair price was given for the whole of the negroes: *Young v. Stallings*, 5 B. Mon. 307.

And so in this case, if Christian had shown himself a creditor of Hundley for the amount that he paid on Ned and Fanny, in claims upon Hundley, that amount being four hundred and nineteen dollars, according to the testimony of Barnes, or five or six hundred dollars, as to be gathered from Hundley's own deposition, we should not be disinclined to grant the desired relief to Christian, if his purchase had extended only to one of the negroes, or if it had extended to both and there were good reasons for them not to be sold separately, and his conduct had been in other respects that which was only attributable to a creditor successful in the race of diligence against the appellees.

But Christian does not occupy the advantageous position of a creditor of Hundley upon which to rest his purchase of Hundley's negroes. Barnes and Hundley are the only persons who testify about the payment for Ned and Fanny; and Hundley, who may be supposed not to be under any bias against Christian, says that Christian paid him in cash nine hundred or a thousand dollars, and in an account against him, in one against his mother, and in one or two against his brother. That is no proof at all that Hundley was indebted to Christian in any specific amount; and Christian must take the place of a stranger who purchases property from a fraudulent seller, and that is one that is far different from being a creditor, endeavoring out of the wreck of an insolvent debtor's property to find something to save his own debt. Still if Christian bought the negroes of Hundley, there being no lien upon them in favor of

the appellees, and paid the value of them without notice of Hundley's fraud, his equity as a purchaser is at least equal to the equity of the appellees to have their debts paid out of Hundley's property, and the legal title derived from the purchase will prevail. His position as a purchaser is different and less favorable than that of a purchasing creditor; for as a purchaser he will be held to be a participator in Hundley's fraud, if he have notice of it, and still deal with him, and thereby afford him the means to make his fraudulent efforts against his creditors successful: *Seymour v. Wilson*, 19 N. Y. 420.

And this is the case, notwithstanding he may have paid a full price for the property: 2 Kent's Com., 8th ed., 674; *Beals v. Guernsey*, 8 Johns. 452. These two authorities refer to property bought in fraud of a judgment, but the reference being to personal property, which a judgment does not bind, the authorities are not inapplicable to this case.

The appellees are judgment creditors, are shown to be so by the bill which alleges the extent of the executions upon Christian's negroes, and though they were not so when Christian bought the negroes, it was from the fraud of Hundley that they were not at that time; and of this fraud, executed with relation to these debts of the appellees, Christian was informed, in October, 1855, by the agent of the appellees.

To have the benefit of the perpetuation of his injunction, Christian should have shown a clear title to the negroes, that is, one unaffected by any taint of fraud. This he has not done. He knew that Hundley had run off these and four other negroes, all he owned, to Louisiana; he had been told by the agent of the appellees that Hundley acknowledged that he had run them off to avoid the debts that he prays not to be extended over the negroes Ned and Fanny. Knowing of these debts, and not knowing of any others that Hundley owed, as it may be presumed he did not know of debts that Hundley could not recapitulate, he did not see that the money he paid to Hundley, or that any part of the two thousand five hundred dollars or two thousand six hundred dollars which Hundley got for the other negroes, was applied, or intended to be applied, by Hundley to their satisfaction; he bought the negroes out of the usual course of business, by buying them when they had been run out of the state, and while they were absent; he paid mostly in cash for them, which could not but aid Hundley in his design to defraud the appellees.

In view of these facts, though we are not called upon to say that Christian was an active participator in Hundley's fraud against the appellees, we are sure that he has not presented such a case as entitles him to the protection of a court of equity. He is brought within the cases that hold that a grantee that has knowledge of the fraud of a grantor must be held responsible for it to the extent of his dealing with him, and that indulge the presumption of a fraudulent intent on his part as well as against the grantor: *Ford v. Williams*, 3 B. Mon. 558; *Partelo v. Harris*, 26 Conn. 482.

The circuit court sitting in chancery properly dismissed the bill of Christian, but that dismissal and the affirmance here are not intended to affect Christian's legal right, only to declare that a court of equity will not interpose in his behalf against the appellees.

BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION will be protected, whether he purchase from a fraudulent grantor or grantee: *Howe v. Waysman*, 49 Am. Dec. 126, and note 131. Such purchaser will be protected as against the fraudulent grantor's creditors: *Wineland v. Coonce*, 32 Id. 320; *Swift v. Holdridge*, 36 Id. 85; *Herndon v. Kimball*, 50 Id. 406.

DEBTOR MAY PREFER CREDITOR OR CREDITORS: *Hempstead v. Johnston*, 65 Am. Dec. 458; *Born v. Shaw*, 72 Id. 633; *Baldwin v. Peet*, 75 Id. 806, and notes to these cases.

EFFECT OF GRANTEE'S PARTICIPATION IN CONVEYANCE made to hinder, delay, or defraud creditors: *Robinson v. Holt*, 75 Am. Dec. 233, and note 236; *Hempstead v. Johnston*, 65 Id. 458.

PURCHASER FROM FRAUDULENT GRANTOR must show that he had no notice of the vendor's fraudulent design: *Rogers v. Evans*, 56 Am. Dec. 537.

DUNCAN v. BATEMAN.

[28 ARKANSAS, 327.]

ONE WHO SELLS LUMBER FOR BUILDING HOUSE is not entitled to a lien thereon, under the Arkansas statute, providing that any artisan, builder, or mechanic, who shall perform any work and labor on any building, edifice, or tenement, shall have an absolute lien thereon, for such work and labor as well as for materials furnished by him, in and about such work and labor.

THE opinion contains the facts.

Gallagher, for the plaintiff.

Garland and Randolph, and Yell, contra.

By Court, FAIRCHILD, J. "All artisans, builders, and mechanics of every description, who shall perform any work and

labor on any building, edifice, or tenement, . . . shall have an absolute lien on such building, edifice, or tenement, for such work and labor, as well as for materials furnished by them, in and about such work and labor:" Gould's Dig., c. 112, sec. 1.

The question is presented, whether a man who sells lumber for building a house is entitled to the lien provided for in the foregoing statute.

A lumber-man is not an artisan, a builder, or a mechanic, and to no other does the statute extend a lien upon a building. That a mechanic or builder may include in his lien the price for materials furnished for the building is his privilege, but that is no reason why one who furnishes materials without doing any work should have a lien. A man who sells lumber for a house has no lien upon it any more than a merchant who sells nails to be used in the building; and neither has a lien, because the statute does not give it to him; while the builder or mechanic has a lien for the same, or any other articles he may furnish for his labor performed upon the house, because the statute does give him such lien. We apply such law as exists, and cannot extend a statute restricted in terms to a particular class of persons to a man not in that class.

The circuit court gave an opposite construction to the statute allowing to Bateman the benefit of the lien, and therefore its judgment must be reversed.

A remark upon this statute in *Brown v. Morison*, 5 Ark. 220, if considered without a reference to the statute, might induce the belief that the lien would operate for those who furnish materials for building under contract with the owner of the ground, but that was not the point under consideration, and if it had been decided so as to include Bateman's account, the decision would have been wrong.

Other questions are made upon pleadings by Duncan, but it is useless to notice them, for the matter decided was raised and settled on the trial of the case in such a way as to require our review of Bateman's action. And it being held that Bateman had no lien under the statute, other errors that may have been committed against Duncan need not be noticed: *Hicks v. Branton*, 21 Ark. 192.

LIEN FOR LUMBER FURNISHED TO ERECT BUILDING ATTACHES WHEN: See *Hunter v. Blanchard*, 68 Am. Dec. 547, and note 549. The principal case is cited, approved, and followed in *Boutner v. Kent*, 23 Ark. 389.

SLAUGHTER v. SLAUGHTER.

[22 ARKANSAS, 356.]

TO MAKE EXECUTORY DEVISE GOOD to a second legatee, the gift to the first taker must be restricted to a life interest, or must be something less than an absolute gift. If an absolute right of property is given to the first taker, a limitation over is void.

THE opinion states the facts.

Stillwell and Woodruff, for the appellant.

Watkins, for the appellee.

By Court, FAIRCHILD, J. "It is essential to the validity of an executory devise that it cannot be defeated by the first taker. If the absolute right of property is given to the first taker, the limitation over is void. For if a legatee possesses the absolute right of property, he certainly has the power of disposing of it in any way he may think proper, and therefore he might defeat the devise or limitation over. If a testator gives property absolutely, in the first instance, to a legatee, he cannot afterwards subject it to any limitation or provision whatever; as, for example, that he shall hold it for life, or that he shall not spend it in a particular manner. The absolute right of ownership carries with it full power of disposing of the property. The case of *Attorney-General v. Hall*, 8 Vin. Abr. 103, pl. 50, expressly decides this point. So, also, the cases of *Flanders v. Clark*, 1 Ves. sen. 9; *Butterfield v. Butterfield*, Id. 134; and *Bradley v. Peizoto*, 3 Ves. 324; the same doctrine is reasserted and affirmed in *Ross v. Ross*, 1 Jac. & W. 154, decided in 1819. Chancellor Kent has stated the principle, contained in all the authorities, very briefly and comprehensively in the second volume of his commentaries, at pages 352-354. The rule there laid down is, 'that chattels or money may be limited over after a life interest, but not after a gift of the absolute property; nor can there be an estate-tail in a chattel interest, for that would lead to a perpetuity, and no remainder over can be permitted on such a limitation; that it is a settled rule that the same words which, under the English law, would create an estate-tail as to freeholds gives the absolute property to chattels.' In *Patterson v. Ellis*, 11 Wend. 259, Senator Edmonds uses this emphatic language: 'That where the use of a chattel is devised to one for life, with remainder to another, the devise of the remainder is valid, and the intention of the testator to give only a life estate must be undisputed; but where the devise is such that the property in the chattel be-

comes absolutely vested in the first taker, any attempt of the testator afterwards to control or restrict the power of disposing of it is an unwarrantable interference with the absolute right of property already granted, and consequently void.'"

This quotation from *Moody v. Walker*, 3 Ark. 187, 188, announces a doctrine well supported by the authorities mentioned in it, and by others which we have examined, and its application to the present case would reverse the judgment rendered in the circuit court, by which the plaintiff below, the appellee by action of detinue, recovered the negroes in suit, as entitled to them under the will of John Pollard, made in Stafford county, Virginia, and 1789.

The appellant, the defendant below, holds the negroes under Elizabeth Pollard, to whom Hannah, the ancestor of the negroes, was bequeathed in the will mentioned, by the following words: "Item. I give and bequeath to my granddaughter, Elizabeth Pollard, one negro girl named Hannah, one bed and furniture, a chest with drawers, large seal-skin trunk, and half of my pewter."

And after similar bequests to other grandchildren, and to the appellee as one, comes the following clause, upon which rests the claim of the appellee, she being the surviving grandchild, Elizabeth Pollard having died without issue: "It is my desire that if any of my grandchildren die without heir, that's heretofore mentioned, that what I've left them shall be equally divided to them living."

It is contended by the appellant that the bequest of Hannah to Elizabeth Pollard was an absolute gift to her, and that if the latter clause had reference to her death, and not to the death of the testator, it confers no right upon the appellee to the slaves that have sprung from Hannah, as it was an illegal attempt to restrict the enjoyment and devolution of property, already given to Elizabeth Pollard, to be used and to pass as her own. And to this we agree. The words of bequest to Elizabeth Pollard plainly import an absolute gift, and because the testator attempted to make a subsequent disposition of the same property, it must not be concluded that his intention was to give only a life interest to the first taker, and that such intention must prevail to pass the increase of Hannah to the appellee, the surviving grandchild. It is true, in general terms, that the intention of the testator is the rule of construction of his will, but it is not so if the intention were meant, or should operate if executed, to overthrow or

avoid a legal principle. This is illustrated by the main position of this court, in *Moody v. Walker*, 3 Ark. 187, that a limitation of property after an indefinite failure of issue is void, and which has received a recent application in this court, in the case of *Watkins v. Quarles*, 23 Id. 179.

The law is equally well settled that, to make an executory devise good to a second legatee, the gift to the first taker must be restricted to a life interest, or must be something less than absolute gift. And this is because it is against the policy of the law that property wholly given away should not be used, enjoyed, and disposed of by the first taker, as if no other person could make any claim to it. That is the effect of *Attorney-General v. Hall*, 8 Vin. Abr. 103, pl. 50, generally cited as in Fitzgibbon's reports, and which is often mentioned and relied on in the subsequent cases. It is the doctrine of *Patterson v. Ellis*, 11 Wend. 259, which was a well-considered case, and treated in *Moody v. Walker*, 3 Ark. 187, as a correct exposition of the law upon this and the other subjects involved in both cases; while *Moody v. Walker*, *supra*, has become too closely incorporated into our jurisprudence to be departed from, if we had any doubts of its correctness upon this point, of which we have none. In *Maulding v. Scott*, 13 Ark. 91 [56 Am. Dec. 298], and in *Scull v. Vaugine*, 15 Id. 702, the same principle was applied, and *Moody v. Walker*, 3 Id. 187, was expressly sustained, and the authority of that case is not an open question in this court.

It has not been argued, nor is it perceived by us, that the Virginia statute read in evidence bears upon the construction of the will of John Pollard, which is the foundation of the claims of both parties. The court of appeals of Virginia has recognized the authority of the cases upon which our construction of the will rests: *Riddick v. Cohoon*, 4 Rand. 551.

This result makes it unnecessary to consider other points argued in this case, and the judgment in this case, and those rendered against William H. Slaughter and Stanton Slaughter in favor of the appellee, upon the same facts, must be reversed.

The three cases will be sent back to the Phillips circuit court to be decided according to law.

WHEN WHOLE ESTATE IS DEVISED or bequeathed absolutely to some person designated, a limitation over is void: *Burbank v. Whitney*, 35 Am. Dec. 312; *Davis v. Richardson*, 31 Id. 581, and citations in notes to these cases. The principal case is cited, approved, and followed, in *Robinson v. Bishop*, 23 Ark. 386.

PATE v. MITCHELL.

[28 ARKANSAS, 590.]

COVENANT OF SEISIN IS BROKEN AS SOON AS MADE, where the grantor, at the time of the conveyance, has no title. The grantee is not bound to wait until he has been disturbed in his possession, but may purchase in the outstanding title, and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same. To recover more than nominal damages, the *onus* is on him to show what the outstanding title was worth; the fact that he paid a certain sum for it is not evidence of its value.

THE opinion contains the facts.

Weatherford, for the appellant.

By Court, COMPTON, J. Thomas H. Tindall, by deed dated the seventeenth of January, 1857, conveyed to Joab Mitchell a tract of land. The deed contained a covenant of seisin, for breach of which the action in this case was brought.

At the trial—which was before the court sitting as a jury—it appeared in evidence that, at the time the deed was executed, the title to a part of the land was not in the grantor, but was outstanding, and that the grantee afterwards bought it. The court found for the plaintiff, and assessed his damages at two thousand one hundred and eighty dollars, being the amount, with interest, paid out by him to perfect his title, as ascertained by the court, and rendered judgment accordingly; from which the defendant appealed to this court, and insists here, that upon the evidence in the record, the plaintiff is not entitled to more than nominal damages.

Though the covenant of seisin is broken as soon as made, where the grantor, at the time of the conveyance, has no title, *Logan v. Moulder*, 1 Ark. 313 [33 Am. Dec. 338], yet it has been held in some of the sister states, and is doubtless the law, that if the grantee has remained in undisturbed possession until it has ripened, under their limitation acts, into a valid title, nominal damages only will be allowed for such technical breach of the covenant: *Rawle on Covenants*, 101, and authorities there cited. In this case, however, there was no such length of possession by the grantee before he purchased the paramount title, as would have barred that title, under our limitation act, had it been asserted; consequently, we need make no decision upon the point.

But, upon another ground, the plaintiff has failed to make out a case entitling him to more than nominal damages. Al-

though the grantee is not bound to wait until he has been disturbed in his possession, but may purchase in the outstanding title, and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same, it is, nevertheless, incumbent on him to prove, not only the amount paid, but that such payment was the reasonable value of the interest required: *Anderson v. Knox*, 20 Ala. 156. He cannot recover more than the price paid, with interest from the time of payment, but may recover less, as the proof may show that the title bought in was not worth the amount paid, or could have been bought for less: *Harlow v. Thomas*, 15 Pick. 69; *Mitchell v. Hazen*, 4 Conn. 495 [10 Am. Dec. 169]. In order to recover more than nominal damages, the *onus* is on the plaintiff to show what the outstanding title was worth; and the fact that he paid a given sum for it cannot be regarded as evidence of its value. In *Anderson v. Knox*, 20 Ala. 156, it was said that such payment was an act done, in which the grantee and the party holding the paramount title were alone the actors; that the grantor was neither a party nor privy to it; and that, as to him, "it was clearly *res inter alias acta*, and according to the established rules of evidence, inadmissible to fix the amount with which he should be charged, but allowable only as a fact, which, if connected with proof of its fairness, would entitle the [grantee] to recover the sum paid."

In the case before us, there is no evidence tending to show that the price paid by Mitchell for the outstanding title was fair and reasonable, or what the title thus acquired was worth; and for this reason, the finding of the court was erroneous, and the judgment must be reversed.

FAIRCHILD, J., did not sit in this case.

COVENANT OF SEISIN IS BROKEN at the moment of its execution, if the grantor is not at the time lawfully seised: *Logan v. Moulder*, 33 Am. Dec. 338, and note 345; *Bacon v. Lincoln*, 50 Id. 765, and note. In order to maintain an action for the breach of such covenant, no eviction need be shown: *Logan v. Moulder*, 33 Id. 338, and note 345; *Lot v. Thomas*, 2 Id. 354; *Share v. Anderson*, 10 Id. 421; *Mitchell v. Hazen*, Id. 169; *Dickson & Gantt v. Desire's Adm'r*, 66 Id. 661, and note 670. In an action for breach of covenant of title, if the grantee extinguishes an outstanding title and seeks to recover the cost thereof, he must show that the price paid was reasonable: Id.; and see citations in note as to measure of damages for breach of covenant of seisin.

IMBODEN v. HUNTER.

[28 ARKANSAS, 622.]

TRUSTEE OR MORTGAGEE WITH POWER TO SELL is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. And it matters not that the sale was *bona fide* and for a fair price. A court of equity, at the instance of the *cestui que trust*, if he applies within a reasonable time, will set aside the sale, as of course.

MORTGAGEE WITH POWER TO SELL, if he cannot gain the consent of his mortgagor to be allowed to bid at the sale, may apply to chancery, and if it is made to appear that his interests may be sacrificed unless he is permitted to bid, the court will divest him of the character of trustee, that he may be enabled to do so, and will substitute some other person to execute the trust.

MORTGAGEE, WITHOUT POWER OF SALE, may purchase the same that he could at sheriff's sale, under execution at law.

TRUSTEE IS ENTITLED TO NO COMMISSIONS where he accepts the trust coupled with an interest, and the deed expressly provides for the payment of the expenses of the trust, but is silent as to whether he shall have compensation for his trouble and attention.

THE opinion states the facts.

Fairchild, for the appellant.

Hempstead, for the appellee.

By Court, COMPTON, J. Absalom Looney was indebted to Washington R. Hunter in the sum of one thousand two hundred and seventy-six dollars and eighty cents, by bond dated the twenty-seventh of March, 1855, and payable, with interest, on the first of August next following, to secure which he executed to Hunter a mortgage on certain negro slaves, with power of sale; in which he stipulated that on failure to pay the bond at maturity, Hunter should have authority to take possession of the slaves, and after advertisement, sell them, or a sufficiency thereof to pay the amount due; and should then transfer or pay over the surplus, if any, whether of slaves or money, to Looney. Looney having failed to make payment, Hunter, in the exercise of the power conferred, sold the whole of the slaves, on the tenth of April, 1857, at public sale. Prior to the sale, Looney, for a valuable consideration, executed to William R. Cain an order by which Hunter was directed to deliver to Cain any surplus, either of slaves or money, which might be left after satisfying Hunter's debt; which order Cain, for a valuable consideration, assigned to John H. Imboden, who, on the twenty-fourth of April, 1857, exhibited the bill in this case, alleging, in addition to the facts above stated, that

there was an overplus of money in Hunter's hands, and that the negro woman Hannah, and her children, mentioned in the mortgage, were bid off at the sale by Samuel McLane for the benefit of Hunter; and praying, in the alternative, that the residue of the money arising from the sale be decreed to him, or that the sale be set aside, and a resale made under the direction of the court, as to Hannah and her children, and for general relief.

On appeal by both parties from the final decree of the chancellor, the main question argued in the court is, whether the chancellor erred in refusing to set aside the sale.

That McLane was a mere nominal buyer of the slaves, and Hunter himself the real purchaser, is an irresistible conclusion from the evidence in the record; and it is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price, and as purchaser, it is his interest to get it for the lowest; and these relations are so essentially repugnant—so liable to excite a conflict between self-interest and integrity—that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule, that the sale was *bona fide*, and for a fair price. The inquiry is not whether there was fraud in the fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party itself works his disability to purchase: *Davoue v. Fanning*, 2 Johns. Ch. 252; *Wormley v. Wormley*, 8 Wheat. 421; *Michoud v. Girod*, 4 How. 503; *Lewis v. Hilleman*, 18 Eng. L. & Eq. 84; *Fox v. Mackreth*, 1 Lead. Cas. Eq. 159, Am. note.

But some of the decisions to which we have been referred maintain the proposition, contended for by the counsel for Hunter, that the case before the court falls within a recognized exception to the general rule. Thus in South Carolina, a sale by the mortgagee, under a power contained in the mortgage, was sustained by the court of appeals as not being obnoxious to the rule that a trustee to sell cannot purchase at his own sale. In delivering the opinion of the court, Chancellor John-

ston said: "The opinion of the court (in which, to avoid being misconceived, I state that I do not concur) is, that a mortgage of personalty does not fall within the principle which prevents a trustee to sell from buying at his own sale. It is my province to state the reasons which have conducted my brethren to this conclusion. A creditor holding a mortgage security is a trustee to sell, not only for the benefit of the mortgagor, but for his own also. If he were not at liberty to bid, he would be deprived of the means of protecting his own interest as creditor. The mortgagor is at liberty to bid also, and has thus the means of entering into fair competition with the mortgagee and compelling him to give a fair and full price. But the court is of opinion that although a mortgagee does not stand in that relation to the mortgagor, which would subject him to an order setting aside, as of course, his purchase at his own sale, yet that he holds such a trust character as to throw the burden on him of supporting his purchase, by proof of fairness:" *Black v. Hair*, 2 Hill Ch. 622 [30 Am. Dec. 389]. The same conclusion was reached by the supreme court of Texas, in *Howards v. Davis*, 6 Tex. 174. The court said: "That a trustee cannot be the purchaser of a trust estate, without leave of the court, is an established rule in equity. A mortgagee is a trustee, but in a qualified sense. He does not hold for the benefit of others, but for himself. He is a *cestui que trust*, as well as trustee. He has an interest in the property. It is pledged expressly to secure his claim; and were he deprived of the power to purchase, he might suffer great loss by its sale at a low price. He has an interest that the bid shall amount to his incumbrance, and that the property be not sacrificed, to the injury as well of the mortgagor as the defeat of his own claim, as this may be the only fund for the discharge of his debt. Sales at foreclosures, whether under a power or by decree, are open and public, and are made after long notice; and it is the interest of the mortgagor that the mortgagee should enter into the competition at the sale."

We do not think that the reasons given by the learned judges who decided these cases are sufficient to warrant a relaxation of the general rule. How the property would be saved from sacrifice, as regards the interest of the mortgagor, by permitting the mortgagee to bid, it is not easy to perceive. If the mortgagee were allowed to bid, it would still be to his interest to purchase at the lowest price. Would he be likely to give more than he would be forced to give by the competi-

tion of other bidders? Or, if a mortgagee liberal enough to do otherwise might be found, would not self-interest dictate an inadequate price? The result, in either case, would be to allow the mortgagee, in the absence of competition, to purchase the property on his own terms. True, it may be necessary, in some instances, that the mortgagee should bid to protect his own interest; but this, it seems to us, furnishes no good reason why the fundamental principle which prohibits him from being both vendor and purchaser should be modified. In all such cases, his remedy, if the mortgagor will not consent that he shall bid at the sale, is to apply to a court of chancery; and if it is there made to appear that his interest may be sacrificed unless he is permitted to bid, the court will divest him of the character of trustee, that he may be enabled to do so, and will substitute the master or other person to execute the trust; provided the court is satisfied that the interest of the mortgagor will not suffer by reason of such permission: *De Caters v. Le Ray*, 3 Paige, 178. Whether the mortgagee is a trustee in a technical sense, or is so in a qualified sense only, can make no difference. The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation of trust or confidence with reference to the subject of purchase. It embraces all who come within its principle, permitting no one to purchase property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, and for his individual use: *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank of Orleans*, Id. 649; *Dobson v. Racey*, 3 Sandf. Ch. 60; *Voorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 136; *Hawley v. Cramer*, 4 Cow. 717. The sale of the property is intrusted to the mortgagee; and because he is beneficially interested, it is not less his duty to sell for the highest price, nor less his interest to purchase for the lowest; and here we have the same struggle between integrity and self-interest, the same temptation to abuse, and the same danger of imposition "inaccessible to the eye of the court," which the general rule is designed to prevent.

In *Hyndman v. Hyndman*, 19 Vt. 9 [40 Am. Dec. 171], which was a bill to redeem, the contract between the parties was held to be a mortgage, with power of sale; and it appearing that the mortgagee, in the exercise of the power, had sold

the premises and become the purchaser, the mortgagor was allowed to redeem. The court said: "The only other ground upon which the defendant claims to hold the estate free from the plaintiff's equity of redemption is, that in pursuance of the power of sale he caused the estate to be sold at auction, and became himself the purchaser. Such sales have always, in the English chancery and in this country, unless when the matter is controlled by the statute, been held voidable at the election of the mortgagor, or *cestui que trust*, unless he delay for an unreasonable time to make his election; in which case he will be held to have confirmed the sale by his acquiescence." The same principle was decided in *Middlesex Bank v. Minot*, 4 Met. 325. And in *Wade v. Harper*, 3 Yerg. 383, a deed of trust was executed by the debtor to a trustee for the benefit of the creditor, to whom power was given to direct the trustee when to sell, and whether for ready money or on credit, thus giving the creditor control of the sale; payment was not made, the property was sold, and the creditor became the purchaser: held, that the sale, however fair and free from fraud, should be set aside, at the election of the heirs of the debtor. "We cannot distinguish the relation of [the creditor] to this transaction," said Catron, C. J., "from that of a commissioner of a bankrupt, where the trustee makes the sale of the assets. In such case, the commissioner has a duty to perform, to make the estate bring the best price, and cannot buy without being subject to have the sale set aside at the election of creditors. In all cases where the property is vested in a trustee, with power to sell, or where there is a power in one to sell the title remaining in the *cestui que trust*, or the aid of a solicitor is called in, or there is an agent to aid in effecting the sale, such persons cannot be permitted to buy the property, denuded of the trust, and if any interested, especially the *cestui que trust*, calls in question the purchase, that it was fair is no defense; the trust attends it."

In New York, it is provided by statute that a mortgagee with power of sale, may purchase; and wherever the courts of that state have recognized the validity of such purchases, the decision will be found to rest upon the statute: See *Jackson v. Colden*, 4 Cow. 266; *Slee v. Manhattan Company*, 1 Paige, 48; *Wilson v. Troup*, 2 Cow. 196 [14 Am. Dec. 458]. The principle decided, however, in *Dobson v. Racey*, 3 Sandf. Ch. 60, clearly shows that, in the absence of statutory provision authorizing the mortgagee to purchase, he would not be permitted to

do so. There, the debtor, in July, 1817, mortgaged a tract of land to the creditor, and in October following, the debtor being about to leave the state, executed to the creditor a power of attorney authorizing him to sell the mortgaged premises, in such manner as he might deem proper; and after discharging the mortgage debt out of the proceeds of the sale, to pay over the surplus to the wife of the debtor. The debtor departed, and died abroad; and in November, 1817, the creditor, by virtue of the power of attorney, conveyed the mortgaged premises to a third person, as nominal purchaser, who, two days afterwards, conveyed to the creditor. On a bill to redeem, the assistant vice-chancellor said: "The validity of purchases, made by fiduciaries of the property intrusted to them, has been much considered recently in the courts of equity, both in this state and in England. And it is now a settled rule, both there and here, that no party can be permitted to purchase an interest, where he has a duty to perform which is inconsistent with the character of purchaser." And he said the rule was applicable to the case before him, whether the creditor was to be regarded as a trustee or as an agent; that his interest as purchaser was in direct conflict with the interest of the debtor, his constituent, or *cestui que trust*; that his purchase caused one of those collisions between interest and duty which equity wisely and resolutely prohibits; and that it made no difference, in the application of the rule, that no fraud was committed, and that the creditor paid a fair price for the property. See also Mr. Hill's work on trustees, 2d Am. ed., 158, in note, where it is laid down that a mortgagee, with power of sale, cannot purchase, citing *Waters v. Groom*, 11 Clark & F. 684.

We scarcely need add that a mortgagee, without power of sale, may purchase the same as he could at sheriff's sale under execution at law; because, in such case, he has no duty to perform inconsistent with the character of a purchaser: *Murdock's Case*, 2 Bland Ch. 468 [20 Am. Dec. 381]; *Lyon v. Jones*, 6 Humph. 533.

The court did not err in denying commissions to Hunter, as trustee. Though the English rule has been modified in this country, and commissions are allowed in some cases, still the trustee is entitled to none, where, as in this case, he accepts the trust coupled with an interest, and the deed expressly provides for the payment of the expenses of the trust, but is silent as to whether he shall have compensation for his trouble and attention.

It is conceded in argument that Hunter was guilty of no actual fraud or unfairness in the sale of the slaves; he was therefore entitled to his costs, and the court should have so decreed.

The decree, except so much of it as denies commissions to Hunter, must be reversed, and the cause remanded to the court below, with the following directions: that under the directions of the court, the slaves, Hannah and her children, be re-exposed to public sale by the master in chancery, or other person appointed by the court for that purpose; that the slaves be put up at the amount of the former sale, and interest thereon from the date of such sale to the time of the reoffering, and if they shall not sell for more than that sum, the sale heretofore made shall, in all things, stand confirmed, but if they shall sell beyond that sum, then the former sale shall be held to be vacated; that the costs of the cause in the court below, together with the necessary expenses attending both sales, be paid out of the proceeds of the sale; and that the residue of such proceeds be applied and disposed of, as in and by the deed of mortgage, and the order of Looney, assigned to the complainant, is directed.

One half the costs in this court will be decreed against Imboden, and the other against Hunter.

FAIRCHILD, J., did not sit in this case.

TRUSTEE CANNOT SELL AND BUY the same property because of the antagonistic interests in the two positions: *Tisdale v. Tisdale*, 64 Am. Dec. 775, and note 784; *Remick v. Butterfield*, Id. 316; *Chorpenning's Appeal*, 72 Id. 789. When the trustee purchases at his own sale, the *cestui que trust* may have the sale set aside, and the property re-exposed for sale: *Scott v. Freeland*, 45 Id. 310; *Harrison v. McHenry*, 52 Id. 435, and notes to these cases.

WHERE MORTGAGE CONTAINS POWER OF SALE, the mortgagee may become the purchaser at a sale thereunder: *Bergen v. Bennett*, 2 Am. Dec. 281; *Carson v. Blakey*, 35 Id. 440, and note 442.

COMPENSATION, TRUSTEE WHEN ENTITLED TO: See *Gibson's Case*, 17 Am. Dec. 257, and note 266.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

MOORE v. SMAW. FREMONT v. FLOWER.

[17 CALIFORNIA, 199.]

UNITED STATES PATENT TO LAND IN CALIFORNIA, issued upon a confirmation of claims held under grants of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain.

OBJECT OF ACT OF CONGRESS OF MARCH 3, 1851, is "to ascertain and settle private land claims in California," and it does not restrict the operation of the patents issued by the United States upon confirmation of the claims, to the interests acquired by the claimants from the former government, nor distinguish the patents so issued from other patents issued by the United States; but patents issued under the act are without words of reservation or limitation, except that they shall not affect third persons.

UNITED STATES LAND PATENTS PASS TO PATENTEE ALL INTEREST of the United States, whatever it may have been, in everything connected with the soil; in everything forming a portion of its bed or fixed to its surface; and in fact, in everything which is embraced within the signification of the term "land."

UNITED STATES OCCUPIES ONLY POSITION OF PRIVATE PROPRIETOR, with reference to its real property within the limits of a state, with the exception that such property is exempt from state taxation; and its patent to such property is therefore subject to the same general rules of construction which apply to conveyances of individuals.

MINERALS OF GOLD AND SILVER PASS BY CONVEYANCE OF LANDS in which they are contained, unless expressly reserved.

ON SEPARATION OF MEXICO FROM SPAIN, MINES OF GOLD AND SILVER, which until then had been vested in the Spanish crown, passed to and vested in the Mexican nation.

UNDER MEXICAN LAW, GOVERNMENT GRANT OF MINERAL LANDS would pass no interest in the minerals, but merely an interest in the soil distinct from that in the minerals, unless by express words the grant passed such minerals.

HISTORY OF SPANISH SYSTEM OF WORKING GOLD AND SILVER MINES, stated.
AT DATE OF CESSION OF CALIFORNIA TO UNITED STATES, minerals existing in land, which had not been discovered, constituted property of the Mexican nation, and hence passed by the cession with all its other property within the limits of California to the United States.

MINERALS OF GOLD AND SILVER, WHICH PASSED BY CESSION OF CALIFORNIA to the United States, were not held by the United States in trust for the future state, nor did the ownership of such minerals vest in the state upon her admission into the Union, such ownership not being an incident of sovereignty; and the United States therefore holds such minerals just as it holds any other public property which it acquired from Mexico.

TERM "SOVEREIGNTY" IS USED TO EXPRESS the supreme political authority of an independent state or nation, and whatever rights are essential to the existence of this authority are rights of sovereignty, as the right to declare war, make peace, levy taxes, and take private property for public use.

RIGHT OF SOVEREIGNTY IS VESTED IN PEOPLE, and is exercised through the joint action of their federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local governments.

OWNERSHIP OF PRECIOUS METALS FOUND IN PUBLIC OR PRIVATE LANDS is not one of the rights of sovereignty which the United States held in trust for future states. Such ownership stands in no different relation to the sovereignty of a state than that of any other property which is the subject of barter or sale.

BY COMMON LAW, RIGHT TO MINES OF PRECIOUS METALS was not an incident of sovereignty, but a personal prerogative of the king, which could be alienated at his pleasure.

ACTION to determine the right to minerals in lands in California acquired under a United States patent. The opinion states the facts.

W. H. Rhodes, for appellant Smaw.

Frank Turk, for appellant Flower.

Charles T. Botts and P. A. McRae, for respondent Moore.

Hall McAllister, for respondent Fremont.

By Court, **FIELD, C. J.** The records in these cases present for consideration the question, whether a patent of the United States for land in California, issued upon a confirmation of a claim held under a grant of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. In the first case, the complaint alleges that in March, 1860, the plaintiff was seised in fee and possessed of a tract of mineral land situated in Butte county, by virtue of a grant issued by Pio Pico, governor of California,

to Dionisio and Maximo Fernandez, on the twelfth of June, 1846, and a patent of the United States, issued on the fourteenth of October, 1857, pursuant to the act of congress of March 3, 1851, for the settlement of private land claims in California; and that whilst thus seised, the defendant entered upon the premises, and extracted and removed from the same large quantities of gold, of the value of four hundred dollars, "which gold was a part and parcel of the said premises, and as such was and is the property" of the plaintiff; and concludes with a demand for damages to the amount of the alleged value of the gold thus extracted and removed. To the complaint the defendant demurred, upon various grounds, the substance of which is, that the title of the plaintiff, as disclosed therein, was of such a character as to vest in him only the ownership of the soil, without any interest in the minerals of gold and silver which it contained.

In the second case, the complaint alleges that on the nineteenth of February, 1856, the plaintiff was seised in fee and possessed of certain premises situated in Mariposa county, and has been thus seised and possessed ever since; that the premises contain large and valuable veins and mines of gold and gold-bearing quartz; that in November, 1860, the defendant entered upon the premises and extracted from the soil thereof five pounds of gold and ten tons of gold-bearing quartz, of the value of two thousand dollars, then and ever since the property of the plaintiff, and removed the same and converted them to his own use; that the plaintiff has demanded of the defendant the delivery of this property, which is refused, and that the defendant still unjustly detains the same; and concludes with a demand of judgment for its possession, or for its value, in case a delivery cannot be had.

The answer of the defendant admits the several allegations of the complaint, except as to the ownership of the plaintiff of the gold and gold-bearing quartz; and avers that, though the plaintiff is seised in fee of the premises, "he has not now, and never has had, any ownership of, or property or interest in, the gold or gold-bearing quartz contained in the soil thereof;" and in the first count, that they are "the absolute and exclusive property of the state of California;" and in the second count, that they are, in like manner, "the absolute and exclusive property of the United States."

The case was presented to the court below upon an agreed statement of facts, and appears to be an amicable suit for the

purpose of determining the question whether the precious metals passed to Fremont with the land in which they are contained, under the patent of the United States. The agreed statement relates principally to the grant to Alvarado, under which Fremont claimed the land in Mariposa, the confirmation of his claim, and the proceedings following such confirmation, and the patent issued to him. The grant was the subject of elaborate consideration by the supreme court of the United States, in the case of *Fremont v. United States*, 17 How. 542, and in the report of the case it is set forth at length, together with the petition upon which it was made. It is sufficient for the present case to state, that the grant was issued to Alvarado in 1844, by Micheltorena, the then governor of California; that it was of a tract of land known as "Las Mariposas," to the extent of ten square leagues; that Alvarado conveyed his interest in the tract to Fremont in 1847; that the validity of the grant was determined by the supreme court in December, 1854, and in pursuance of the mandate of that court, a final decree of confirmation was entered by the district court in June, 1855; that in July following the ten leagues were surveyed and segregated from the general tract embraced within the exterior boundaries designated in the grant, under the direction of the surveyor-general of the United States for California; that the survey was subsequently approved by that officer, and that upon the survey and decree of confirmation a patent was issued by the United States on the nineteenth of February, 1856, signed by the president, and countersigned by the acting recorder of the general land-office at Washington, and bearing the seal of that office. The patent refers to the grant, and the proceedings taken for the confirmation of the claim of Fremont thereunder, the judgment of the supreme court, and the final decree of the district court, the survey in pursuance thereof and its approval, and concludes with the following granting clause: "That the United States of America, in consideration of the premises, and pursuant to the provisions of the act of congress aforesaid of the third of March, 1851, have given and granted, and by these presents do give and grant, unto the said John C. Fremont, as alienee of Juan B. Alvarado, and to his heirs, the tract of land embraced and described in the foregoing survey, to have and to hold the said tract, with the appurtenances, unto the said John C. Fremont, as alienee of the said Juan B. Alvarado, and to his heirs and assigns forever." This patent embraces

the premises described in the complaint, from which the gold and gold-bearing quartz in controversy were extracted and removed. All claim for damages for the entry upon the premises, and the disturbance of the soil, are expressly waived, and the claim of the plaintiff, and the defense of the defendant, both made to rest exclusively upon the question, whether the plaintiff has a right of property in the gold and gold-bearing quartz, for the recovery of which the action is brought.

At the time the grants to the Fernandezes and to Alvarado were issued, it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the government of the land in which they were contained, without express words designating them. By the ordinary grant of land, only an interest in the surface or soil, distinct from the property in the minerals, was transferred. The Mexican law on this subject was derived from the Spanish law, differing from it only in the particulars occasioned by the change in the government of Mexico following the separation of the latter country from the Spanish monarchy. Under Spain, the mines constituted the property of the crown, as part of the royal patrimony. It was so declared in various laws at an ancient period. By a law of the Partidas, which was promulgated as early as 1343, it was declared that the mines were so vested in the king that they did not pass in his grant of the land, though not excepted in terms: Law 5, tit. 15, p. 2. By a law of Alphonso XI., all mines of silver and gold, and of other metals, and the produce of the same, were declared to be the property of the crown, and no one was allowed to work them, except by special license or grant, or unless authorized by immemorial prescription: Rockwell's Spanish and Mexican Laws, 126. By a law of John I., this rule was modified, and a general license was granted to all persons to search for and work the mines in their own lands, and by permission of the owners, in the lands of others, and to retain one third of the net produce, the balance to be rendered to the king: Rockwell's Spanish and Mexican Laws, 126. Under this law, few mines were discovered and worked, owing in part, as was supposed, to the fact that a great proportion of the mines of the country had been previously granted to noblemen, and others with bishoprics, arch-bishoprics, and provinces, with exclusive privileges. To remove the obstacles thus interposed to the dis-

covery and development of the mineral wealth of the country, Philip II., by a decree promulgated on the tenth of January, 1559, annulled all previous exclusive grants made by himself or his predecessors, except in those cases where the mines were at the time worked; and resumed and incorporated into his patrimony all the mines of gold, silver, and quicksilver in his kingdom, wherever found, "whether in public, municipal, or vacant lands, or in inheritances, places, and soils of individuals:" Halleck's Mining Laws of Spain and Mexico, 6. The object of this incorporation was not to restrict to the king the right to search for and work the mines, but to extend this right freely to all persons. Accordingly, in the second article of the decree, the king granted permission and authority to all his subjects and native citizens to search for and work mines of gold and silver in all lands of the kingdom, with certain specified exceptions; subject, however, to the payment to the crown of a certain proportion of the net produce derived from the mines discovered. From the promulgation of this decree, the ownership of the precious metals by the sovereign throughout the dominions of the Spanish monarchy was, in all subsequent legislation, fully recognized, and the policy of allowing all persons to search for, and upon discovery to work, the mines, was rigidly followed.

Various ordinances prescribing the extent of the acquisitions which might be made by individuals by discovery, and the manner in which the incipient right thus obtained should be authenticated, perfected, and maintained, were passed at different periods. It is unnecessary for the present case to refer particularly to their provisions. It is sufficient to state that they required a registry of the discovery before certain public officers, and that the registry, when made, operated as a concession of the mine to the discoverer, subject to certain conditions. They all proceeded upon the admitted right of the crown to the minerals. Those established on the twenty-second of August, 1584, and generally designated as the "new ordinances," to distinguish them from regulations of an earlier date known as the "old ordinances," whilst revoking all previous laws, edicts, privileges, and customs, in express terms excepted the decree of January 10, 1559, so far as it vested in the crown all mines of gold and silver and quicksilver, and annulled all grants which had been previously made. These ordinances were in force, not only in Spain, but in New Spain, which included California, until the year 1783. In this latter year, the king

gave his approval to the code of mining ordinances framed for New Spain by the general mining tribunal formed in 1778, and ordered that all their contents should be regarded as "law and statute, positive and perpetual," and be "inviolably observed, notwithstanding any other laws, ordinances, establishments, customs, or practices to the contrary;" which, so far as existing, were thereby expressly revoked. These ordinances were published by proclamation of the viceroy throughout New Spain in January, 1784. In the first article of the fifth title, they declare that the mines are the property of the royal crown, as "well by their nature and origin as by their reunion, declared in law 4, title 13, book 6, of the Nueva Recopilacion." The law thus named is the decree of Philip II., of January 10, 1559, to which we have already referred.

Upon the separation of Mexico from Spain, the mines, which until that period were vested in the Spanish crown, passed to and vested in the Mexican nation. Upon this subject, Lares, a distinguished Mexican writer, says:

"The Mexican nation, having been declared free and independent of the Spanish government and of every other power, the seigniorship of the king of Spain over the mines absolutely terminated in like manner as terminated all the dominion and sovereignty which he might have exercised over the territory of the nation. What are, then, the principles recognized at present by legislation in regard to the mines?

"The legislator has not occupied himself at all in making a formal declaration upon the matter, like that which was made in France in 1791, nor upon a regulation, complete and definite, like that of 1810; but in those partial provisions which he has made upon the branch of mining, he has recognized, in a manner implied, but clear and evident, the principle that the mines belong to the nation; declaring expressly that to it alone does it appertain to grant this class of property. Thus it is that in the decree of the general congress of October 7, 1823, enabling foreigners to make with the owners of mines contracts for every kind of supplies, even to the extent of acquiring in ownership shares in the operations which they supply, he reminds them that they have to remain subject in everything to our ordinances for the working of the mines, and to the other obligations and charges under which the nation grants the ownership of such parcels of ground to every citizen.

"Two principles, each most important, the legislator recog-

nizes in this notable disposition: 1. That the ordinances of mining are in force, and by them must be regulated the working of the mines; 2. That it is the nation which grants the ownership of the mines. But how could the nation grant that which it has not? And how would it be able to give to one that which it might have acknowledged to belong to another? The law, therefore, has not recognized the property of the 'mine' to be in the owner of the field, but has made it to consist in the grant which the nation makes to him who registers or denounces it in conformity with the ordinance.

"The same was the conception of the decree of March 11, 1842, which empowered foreigners to acquire real property. In speaking of the mines, it empowers them to acquire in ownership those of which they should be the discoverers, in conformity to the ordinance upon that branch. Here, again, is seen united the ownership with the grant, through the medium of the discovery, in the terms which the ordinance prescribes.

"There is, therefore, no doubt that our legislation, like the French, distinguishes the property of the soil from that of the mine; recognizes that only the nation can grant the latter property; and establishes that the grant is made in the manner which is determined in the ordinance of 1783:" *Lares's Derecho Administrativo*, 91, 93.

The minerals thus vested under the Spanish monarchy in the crown—and after the separation of Mexico, in the nation—did not pass, as we have already stated, by the ordinary grant of land, without express words of designation. Such grant transferred only an interest in the soil distinct from that of the minerals. The interest in the minerals was conveyed, through the operation of the mining ordinances, by registry of discovery, or by proceedings upon denouncement when a mine, once discovered and registered, had been abandoned or forfeited. At the date of the cession of California to the United States, no minerals of gold or silver had been discovered in the land embraced by the grant to the Fernandezes or by the grant to Alvarado; and of course no proceedings had been taken by which any individual interest in them was acquired from the government. They constituted, therefore, at that time the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States.

We do not understand that this conclusion is controverted

by the defendants; but two positions are advanced by them which, though inconsistent with each other, would, if sustained, be equally availing against the claims of the plaintiffs: 1. That the minerals of gold and silver which passed by the cession were held by the United States in trust for the future state, and that upon the admission of California the ownership of them vested in her; and 2. That the minerals remain the property of the United States, and did not pass by their patents.

The first position finds support in the decision of *Hicks v. Bell*, 3 Cal. 219, where this court held that the mines of gold and silver found in the public lands are the property of the state by virtue of her sovereignty, and assumed that similar mines in the lands of private citizens also belonged to her by the same right. That decision has not met the approbation of the profession or retained the approbation of the distinguished judge who delivered it. The question as to the ownership of the minerals was not raised by counsel, and its determination was not required for the disposition of the case. But independent of this consideration, which only goes to the force of the decision as authority, we are clear that the doctrine there advanced cannot be sustained. It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future state, and that such rights at once vested in the new state upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a state than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent state or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. In this country, this authority is vested in the people, and is exercised through the joint action of their federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty; and with respect to sovereignty, rights and powers are synonymous terms; and the exercise of all other rights of

sovereignty, except as expressly prohibited, is reserved to the people of the respective states; or vested by them in their local governments. When we say, therefore, that a state of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the federal government, or prohibited to the states; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the constitution of the United States. To the existence of this political authority of the state—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals without affecting in any respect the political jurisdiction of the state. They may be acquired by the state as any other property may be, but when thus acquired, she will hold them in the same manner that individual proprietors hold their property, and by the same right—by the right of ownership, and not by any right of sovereignty.

In *Hicks v. Bell*, 3 Cal. 219, the court states correctly that, according to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under the general designation of lands or mines; but it assumes that this right of the crown—this regalian right—vested in the state. "It is hardly necessary," in the language of the opinion, "at this period of our history, to make an argument to prove that the several states of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the king at common law." It is in this assumption that the error of the decision consists. Under the general designation of *jura regalia* are comprehended, not only those rights which pertain to the political character and authority of the king, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects. It is only to certain rights of the first class that the states, by virtue of their respective sovereignties, are entitled. It is to the second class that the right to the mines of gold and silver belongs.

In the great case of *Queen v. Earl of Northumberland*, 1 Plowd. 310, which was argued before the barons of the ex-

chequer and all the justices of England, it was held by their unanimous judgment, "that by the law all mines of gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore;" and also, "that a mine royal, either of base metal, containing gold or silver, or of pure gold and silver only, may, by the grant of the king, be severed from the crown, and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words." This case was decided in 1568, during the reign of Queen Elizabeth, and continues unto this day an authoritative exposition of the doctrine of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the king, which could be alienated at his pleasure.

No reasons in support of the prerogative are stated in the resolution of the judges, and those advanced in argument by the queen's counsel would be without force at the present time. Onslow, the queen's solicitor, says Plowden, "alleged three reasons why the king shall have mines and ores of gold and silver within the realm, in whatsoever land they are found. The first was in respect to the excellency of the thing, for of all things which the soil within this realm produces or yields, gold and silver is the most excellent; and of all persons in the realm the king is, in the eye of the law, most excellent. And the common law, which is founded upon reason, appropriates everything to the person whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the king. . . . The second reason was in respect of the necessity of the thing. For the king is the head of the weal-public, and the subjects are his members; and the office of the king, to which the law has appointed him, is to preserve his subjects; and their preservation consists in two things, viz., in an army to defend them against hostilities, and in good laws. And an army cannot be had and maintained without treasure, for which reason some

authors, in their books, call treasure the sinews of war; and therefore, inasmuch as God has created mines within this realm, as a natural provision of treasure for the defense of the realm, it is reasonable that he who has the government and care of the people, whom he cannot defend without treasure, should have the treasure wherewith to defend them. . . . The third reason was in respect of its convenience to the subjects, in the way of mutual commerce and traffic. For the subjects of the realm must, of necessity, have intercourse or dealing with one another, for no individual is furnished with all necessary commodities, but one has need of the things which another has, and they cannot sell or buy together without coin. . . . And if the subject should have it (the ore of gold or silver), the law would not permit him to coin it, nor put a print or value upon it, for it belongs to the king only to fix the value of coin, and to ascertain the price of the quantity, and to put the print upon it, which being done, the coin becomes current for so much as the king has limited. But if the subject should have the ore of gold and silver which is found in his land, he could not convert it into coin, nor put any print or value on it. For if he makes coin, it was high treason by the common law before the statute of 25 Edw. III., c. 2, as it appears by the twenty-third assizes, where a woman was burned for forging or counterfeiting money; and it was high treason to the king, because he has the sole power to make money. So that the body of the realm would receive no benefit or advantage if the subject should have the gold and silver found in mines in his land; but on the other hand, by appropriating it to the king, it tends to the universal benefit of all the subjects, in making their king able to defend them with an army against all hostilities; and when he has put the print and value upon it, and has dispersed it among his subjects, they are thereby enabled to carry on mutual commerce with one another, and to buy and sell as they have occasion, and to traffic at their pleasure. Therefore, for these reasons, viz., for the excellency of the thing, and for the necessity of it, and the convenience that will accrue to the subjects, the common law, which is no other than pure and tried reason, has appropriated the ore of gold and silver to the king, in whatever land it be found."

It would be a waste of time to show that none of the reasons thus advanced in support of the right of the crown to the mines can avail to sustain any claim of the state to them.

The state takes no property by reason of "the excellency of the thing," and taxation furnishes all the requisite means for the expenses of government. The convenience of citizens in commercial transactions is undoubtedly promoted by a supply of coin, and the right of coinage appertains to sovereignty. But the exercise of this right does not require the ownership of the precious metals by the state, or by the federal government, where this right is lodged under our system, as the experience of every day demonstrates.

The right of the crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the king, which was at the time justified on the ground that the mines were required as a source of revenue. The same regalian right was recognized on the continent as in England, and of its origin, Gamboa, in his commentary on the mining ordinances of Philip II., thus speaks: "Upon the breaking up of the Roman empire, the princes and states, which declared themselves independent, appropriated to themselves those tracts of ground in which nature has dispensed her most valuable products with more than ordinary liberality, which reserved portions or rights were called 'rights of the crown.' Among the chief of the valuable products are the metallic ores of the first class, as those of gold and silver and other metals proper for forming money, which it is essential for sovereigns to be provided with in order to support their war-like armaments by sea and land, to provide for the public necessities, and to maintain the good government of their dominions."

It follows from the views we have thus expressed, that the first position advanced by the defendants cannot be sustained; that the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future state; that the ownership of them is not an incident of any right of sovereignty; that the minerals were held by the United States in the same manner as they held any other public property which they acquired from Mexico; and that their ownership over them was not lost, or in any respect impaired, by the admission of California as a state.

The second position of the defendants is, that if the minerals did not vest in the state by her admission into the Union, they remained the property of the United States, notwithstanding their patents to the Fernandezes and to Fremont. This position is not based upon any language of the patents, for it is ad-

mitted that their terms of grant would operate, in case of a conveyance of an individual, to pass all the interest which the grantor could possess in the land. It is based upon the supposition that as the act of March 3, 1851, provides for the recognition and confirmation of the rights acquired by the grants from Mexico, the patents were only intended as evidence on the part of the United States of such recognition and confirmation. By those grants, as we have seen, no interest in the minerals of gold and silver passed to the grantees, and if the patents amount only to an acknowledgment of the rights derived from the former government, that interest still remains in the United States. This view of the patents is not justified by any provisions of the act. The object of the act is to "ascertain and settle" private land claims in California. This object is declared in the first section. It is not merely to ascertain but "to settle" the claims; that is, to establish them—to perfect them by placing them, so far as the government is concerned, beyond controversy. This ascertainment is intrusted by the act to a board of commissioners, and to the courts. By proceedings before them, the validity of the claims is determined; yet little benefit would result to the claimants from such determination if the act required or authorized nothing further. Many of the claims held in this state fall far short, even when confirmed, of being available titles; some are mere inchoate titles; some are equitable titles; and some are to specific quantities of land situated within boundaries embracing a much larger extent. The act, therefore, provides for proceedings to be taken after the claims have been subjected to the investigation of the board and the courts. The lands claimed are to be surveyed and segregated from the public domain by the officers of the government, and patents are to issue to the claimants. The issuance of the patents does not depend upon the character of the claims—whether they be legal or merely equitable, or whether they be of specific tracts or floating interests. It depends solely upon the recognition of their validity by the decree of confirmation. "For all claims finally confirmed," reads the act, "by the said commissioners, or by the said district or supreme court, a patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California."

There is nothing in the act restricting the operation of the

patents thus issued to the interests acquired by claimants from the former government, or distinguishing the patents in any respect from the general class of conveyances made, under that designation by the United States. To all claimants alike, whose claims have been finally confirmed, patents are to issue without words of reservation or limitation, with the exception that they shall not affect the interests of third persons—an exception which would exist independent of its legislative recognition. Such being the case, the question arises as to what passed by the patents to the Fernandezes and to Fremont, and to this question there can be but one answer: all the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term "land;" and that term, says Blackstone, "includes not only the face of the earth, but everything under it or over it. And therefore," he continues, "if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows:" 2 Bla. Com. 19. Such is the view universally entertained by the legal profession as to the effect of a patent from the general government. The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. From the operation of conveyances of this nature, that is, of individuals, the minerals of gold and silver are not reserved unless by express terms. They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the patent—the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains in them without a similar reservation. Nor is there anything in the language of the supreme court, in the opinion rendered in the Fremont case, which gives countenance to any other view. The attorney-general of the United States objected to the confirmation of the claim of Fremont, upon the ground that the grant to Alvarado contained mines of gold and silver. His argument was to this effect: that as the mines did not pass to the grantee by the Mexican law, the claim should not be confirmed, as Fremont would obtain, as a consequence of such confirmation,

a patent which would pass the minerals, to which, by the original grant, he was not entitled. But to this, the court replied that, under the mining laws of Spain, the discovery of a mine of gold and silver did not destroy the title of the individual to the land granted, and that the only question before the court was the validity of the title; and whether there were any mines in the land, and if there were any, what were the rights of sovereignty in them, were questions which must be decided in another form of proceeding, and were not submitted to the jurisdiction of the commissioners or the court by the act of 1851; in other words, the court said, in substance, that its consideration was confined to the title presented, and the effect of its decree and the patent following it upon the ownership of the minerals was a matter with which it had nothing to do.

The construction given by the United States to their patents, ever since the organization of the government, has uniformly been to the same effect. In several of the states, particularly those carved out of territories ceded by Virginia, North Carolina, and Georgia, and out of the territory acquired by the treaty with France in 1803, and by the treaty with Spain in 1819, the title to a large portion of the lands is held under patents from the United States. Some of these patents were issued upon a sale of lands; some of them upon a donation of lands; and some of them upon a confirmation by boards of commissioners of previously existing grants of the former governments. They were issued to extensive tracts in the territories of Louisiana, Mississippi, and Florida, and in many cases they embraced lands in which minerals of gold and silver and other metals existed. Yet, in no instance, whether the patents were issued upon a sale or donation of lands, or upon a confirmation of a previously existing grant, have the United States asserted any right to the mines, as being reserved from the operation of the patents. They have uniformly regarded the patent as transferring all interests which they could possess in the soil, and everything imbedded in or connected therewith. Whenever they have claimed mines, it has been as part of the lands in which they were contained; and whenever they have reserved the minerals from sale or other disposition, it has only been by reserving the lands themselves. It has never been the policy of the United States to possess interests in land in connection with individuals.

Judgment affirmed.

BALDWIN, J. I concur in the judgment in this case, for the reasons given by the chief justice.

COPE, J., concurred.

RIGHT TO MINE, AND LAW OF MINES AND MINERALS applicable to California and other states whose lands were acquired from Mexico: See extensive note to *McClintock v. Bryden*, 63 Am. Dec. 91-110.

DEFINITION OF RIGHTS OF SOVEREIGNTY, AND IN WHOM VESTED: See *Campbell's Case*, 20 Am. Dec. 360; *Commonwealth v. Baldwin*, 26 Id. 33; *Deering v. Bank of Charleston*, 48 Id. 300; *People v. Coleman*, 60 Id. 581, and cases in notes.

SOVEREIGNTY RESPECTING PUBLIC LANDS AND MINES THEREIN IN CALIFORNIA: See *McClintock v. Bryden*, 63 Am. Dec. 102, 103.

THE PRINCIPAL CASE IS CITED IN *Fremont v. Seal*, 18 Cal. 435, to the point that "title resting upon mining rules and regulations cannot avail against the paramount proprietor—the United States—and as a consequence cannot against parties who claim by conveyance from the United States." It is also cited in *Al Hee v. Crippen*, 19 Id. 497, to the point that owners of land in California, who derived title under grants of the former Mexican government and United States patents issued upon the confirmation thereof, were thereby invested with the ownership of precious metals which the land might contain.

BUFFANDEAU v. EDMONDSON.

[17 CALIFORNIA, 436.]

SHERIFF IS NAKED TRESPASSER, AND LIABLE IN DAMAGES, if, having levied upon property of an execution debtor, he proceeds to sell the same, notwithstanding the defendant in execution has obtained, from the court in which the judgment was rendered, an injunction restraining the plaintiff in the judgment, his servants and agents, from proceeding to sell under such execution, which injunction has been served upon the sheriff; and this, though the sheriff be not a party to the injunction suit.

TRESPASS. The facts are stated in the opinion

Holladay and Cary, for the appellant.

B. S. Brooks, for the respondent.

By Court, BALDWIN, J. This was a suit brought against the defendant, sheriff of Alameda county, for proceeding to sell property of plaintiff, which the defendant had levied on by virtue of an execution, the plaintiff claiming that before the sale an injunction had issued, at the suit of the plaintiff, enjoining such sale. The complaint also avers that the plaintiff had been discharged from the debt on which the execution issued, by virtue of certain insolvent proceedings. Upon the trial, a nonsuit was ordered. The bill on which the injunction

was granted was filed by plaintiff against one New, and the injunction restrained, by its terms, New, his agents and servants, from proceeding to sell under the execution. A copy of the injunction and of the complaint was served upon the sheriff before the sale, but he proceeded, nevertheless, to make the sale.

It is unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff to know that a court of competent jurisdiction had made the order, and then it became his duty to obey it. It is no part of a sheriff's duty to sit in judgment upon judicial acts, and reform the errors or revise the orders of the judge. As the execution is only an order of the court, it would be strange if the sheriff were held under onerous penalties to obey its commands, and yet be absolved from the duty of yielding obedience to an order made directly by the judge, touching the same subject-matter. The injunction, so long as it remained in force, operated as a *supersedeas* to the execution; the legal authority to sell the property was withdrawn by the same authority which had given it, to wit, by the act of a competent court; and the sheriff had no more legal justification for his act than if he had proceeded to sell after the execution had been quashed. The injunction in this case had direct effect upon the process itself, and though in order to charge the sheriff it was necessary that he should have notice of the order, yet, after such notice, his act was in defiance of law, and in contempt of the court. It is true that for such conduct the law has provided a remedy by the punishment of the offender; but this provision is more for the sake of the public than for the redress of the private grievance involved in such delinquency. As the only authority of the sheriff to levy and sell came from the execution, and as the injunction superseded the execution and withdrew the authority, it follows that the sheriff is no better protected than if he were a naked trespasser.

It is said that the sheriff was not made a formal party to the bill of complaint in the injunction suit, and therefore was not bound to obey the writ. Being a mere ministerial officer, with no interest in the subject of controversy, and acting in the execution of the process as the agent of the plaintiff in the writ, we are by no means convinced that he was a necessary party to the proceeding. But if he were, he was a mere formal

party, and the failure to include him by name did not absolve him from the duty of obeying the order when notified of it. If, on petition, a *supersedeas* had issued, or an order for a stay of the execution had, or an order quashing it had been made, no doubt can exist that the order would be effectual without any previous notice to the sheriff, or his having been made a party, and we see no difference in principle in this respect between an order in equity of this character and one at law. In Story's Equity Pleadings, sec. 229, it is said: "The misjoinder of a mere nominal or formal party will often be dispensed with, if entire justice can be done without him. Indeed, the joinder or misjoinder of nominal or formal parties will not ordinarily be allowed by the court as a valid objection to proceedings under the bill." And again (sec. 231): "In the next place, no person should be made a party who has no interest in the suit, and against whom, if brought to a hearing, no decree can be had. Upon this ground, it is that a person who is a mere agent in the transaction ought not to be made a party to a bill; as, for example, an auctioneer who has sold an estate, the sale being the matter in controversy; or a steward, or receiver of the rents and profits, where the controversy is between vendor and vendee to a bill for a specific performance; or an attorney, or solicitor, who has negotiated an annuity to a bill to set it aside on account of a defective memorial; or an arbitrator to a bill to enforce or to set aside an award."

It is said that no precedent can be found for such an action as this against an officer for disobedience of the order of the court, and this is urged as persuasive of the conclusion that it is not maintainable. Several cases are cited which are not analogous in fact or principle. It would present a strange anomaly in jurisprudence if a public officer could convert property when he was expressly inhibited by the law from taking it, and claim protection from legal responsibility by showing an execution which had been legally superseded. The principle is familiar enough to need no citation of authority, that a sheriff cannot seize or sell the property of a citizen, unless he has legal process authorizing it; and that process which has been superseded is no authority at all when the officer is duly notified of the order of *supersedeas*. Many technical points have been taken by the respondents, but there is nothing in any of them worthy of further examination.

It is not necessary to consider the effect of the insolvent

proceedings, for independent of this ground, the plaintiff was entitled, upon the case made, to judgment. If the sheriff, without legal authority, converted the plaintiff's property, *prima facie* he is responsible to the plaintiff for at least its value; and if he has any defense arising from the fact that the property was justly subject to the plaintiff's debts, and has been so applied, it will be time enough to inquire whether this is properly in mitigation of damages, when the defense is made and the facts presented. We intimate no opinion now upon the subject.

Judgment reversed, and cause remanded.

FIELD, C. J., concurred.

THE PRINCIPAL CASE IS CITED in *McComb v. Reed*, 28 Cal. 286, to the point that it is the duty of a sheriff to obey the orders of a court of competent jurisdiction in proceedings before it, and that it is no part of his duty to sit in judgment upon official acts and reform the errors or revise the orders of the judge.

JONES v. STEAMSHIP CORTES.

[17 CALIFORNIA, 487.]

MEASURE OF DAMAGES IN ACTION FOR BREACH OF CONTRACT FOR CARRIAGE OF PASSENGERS is not only the direct pecuniary loss resulting from the breach of contract, but damages may be recovered for any fraudulent or oppressive conduct on the part of defendants producing great bodily or mental suffering; the question as to what damages are commensurate with the injuries sustained being one for the jury.

UNDER CALIFORNIA SYSTEM OF PLEADING, THERE IS BUT ONE FORM OF ACTION, and the statute makes no distinction in matters of form between actions of contract and those of tort, relief being administered without reference to the technical and artificial rules of the common law.

IN CALIFORNIA, ALL MATTERS MAY BE LITIGATED IN SAME ACTION which arise from and constitute part of the same transaction.

IN CALIFORNIA, CAUSE OF ACTION IN TORT MAY BE UNITED WITH CAUSE OF ACTION ON CONTRACT, if both arise out of the same transaction.

ACTION for damages for breach of contract. Defendants, common carriers, had agreed to convey plaintiff, Mrs. Jones, from San Francisco to Juan del Sur, in Nicaragua. Instead of so doing, they landed Mrs. Jones at Panama. She seeks to recover, not only for her direct loss, but also damages for suffering by reason of fraudulent and oppressive conduct of defendants in carrying her to Panama against her will, and there landing her amongst strangers, without the means of support or of proceeding on her journey, in an unhealthy cli-

mate, amongst a hostile population, where she was exposed to great dangers. The remaining facts are stated in the opinion.

Delos Lake, for the appellant.

A. P. Crittenden, for the respondents.

By Court, COPE, J. In 1856, the defendant was engaged in carrying passengers from the port of San Francisco, in this state, to San Juan del Sur, in Nicaragua, and the action is brought for a breach of a contract to convey the plaintiff, Mary A. Jones, who was then unmarried, from the former to the latter port, and for wrongs and injuries sustained by her in consequence of the violation of the agreement. The grievances complained of were occasioned by the voluntary action of the owners and agents of the defendant; and on the trial of the case, the plaintiffs were permitted to present the whole matter for the consideration of the jury. They were allowed to show, among other things, that the contract was fraudulent in its inception, and that great mental and bodily suffering had been produced by the peculiar circumstances attending its infraction. The evidence established a most aggravated case of hardship and oppression, and a verdict was rendered for three thousand eight hundred dollars damages. It is objected that the rule of damages adopted by the court below was erroneous, and the validity of this objection is the principal question submitted for our determination.

In actions founded upon a breach of contract, the common law adheres with great tenacity to the rule which excludes all inquiry into the motive or *animus* of the contracting parties, and limits the damages to the direct pecuniary loss resulting from the breach. But there are instances, says Chitty, in which the defendant may be regarded in the light of a wrongdoer in breaking his contract, and where this is the case, a greater latitude is allowed the jury in assessing the damages: Chit. Con. 767. It was held by the constitutional court of South Carolina, in an action of *assumpsit*, that the existence of fraud was sufficient to warrant the jury in departing from the ordinary rule upon this subject. "*Assumpsit*," said the court, "is *nomen generalissimum*, under which a great variety of special cases are embraced. It includes every case by simple contract, whether in the nature of a warranty, a promise to pay money, or an undertaking to do or perform any act from whence a promise, either express or implied, can arise. The damages to be recovered must always depend on

the nature of the action and the circumstances of the case. The difference of opinion which seems to exist on the subject, we apprehend, has arisen from confounding the distinctions between the different forms of *assumpsit*. In an action for money had and received, the actual amount of money received, with interest in some cases, should be the measure of damages; in an action for goods, or any specific chattel, sold and delivered, the value of the thing sold; and so in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud, and other cases merely sounding in damages, the jury may give a verdict to the whole amount of the injury sustained or imaginary damages:" *Rose v. Beatie*, 2 Nott & M. 538. This case was subsequently approved in *Garrett v. Stuart*, 1 McCord, 514. Sedgwick, in his work on the measure of damages, combats this doctrine with great earnestness and ability. After discussing the matter at some length, he says: "On the whole, therefore, notwithstanding the cases cited in the notes, and the authority of the tribunals by which they are decided, I conclude that so long as our present forms of action and rules of pleading and evidence exist, their clear and irresistible result is, that the damages in actions of contract are to be limited to the consequence of the breach of the contract alone, and that no regard is to be had to the motives which induce the violation of the agreement: Sedgwick on Damages, 208. But in a note on the same page, he adds: "I am far from desiring to express any opinion in favor of the doctrine of the text; on the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent and malicious breach of contract, as well as for any other willful wrong."

In the present case, it is not important to inquire which of these opinions in relation to the rule at common law is correct. The injuries complained of were of such a character that redress may undoubtedly be obtained in some form, and under our practice, there is no reason why the plaintiffs should be compelled to resort to different actions for the relief to which the law entitles them. We have but one form of action, and nothing more is required than a statement in ordinary language of the facts relied upon for a recovery. The statute makes no distinction in matters of form between actions of contract

and those of tort, and relief is administered without reference to the technical and artificial rules of the common law upon this subject. Different causes of action may be united in the same complaint, and the only restrictions upon the pleader in this respect are those imposed by the statute. Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist as far as possible in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed, and we see no reason why all matters arising from and constituting part of the same transaction should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united, but the object of this rule is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances so connected as to constitute but one transaction. The statute provides that a claim for injuries to the person shall not be joined with a claim for injuries to character. In a case in New York, involving the construction of a similar provision in the code of that state, it was held that a demurrer to the complaint, the facts stated being sufficient to sustain an action either for assault and battery or for slander, was not well taken. The court said: "The complaint in fact contains but a single cause of action. The allegations relate to a single transaction. The complaint purports to give the history of one occurrence, and no more. This history embraces what was done and what was said on the occasion. Each constitutes a part of the *res gestæ*. What is alleged to have been done would, if established upon the trial, sustain an action for personal injury. What is alleged to have been said would, if established upon the trial, sustain an action for injury to the reputation. The whole together, constituting as it does but a single transaction, makes but a single cause of action. The plaintiff brings his action upon the whole case to recover damages for the compound injury he has sustained. . . . When it comes to trial, all that was said and all that was done become the proper subjects of investigation, and a single verdict adjusts the rights of the parties." *Brewer v. Temple*, 15

How. Pr. 286. In *Robinson v. Flint*, 16 Id. 240, a cause of action in tort was united with a cause of action on contract, and it appearing that these causes of action arose out of the same matter, it was held that they were properly united. The code contains a special provision upon this subject, but we think that the effect of our statute is the same, and that the construction would not be altered by the incorporation of a similar provision. Having adopted a system which rejects all distinctions in matters of form, it would be folly to subject it to the operation of rules founded upon distinctions of this nature. Every action under our practice may be properly termed an action on the case, and it would seem that any ground of relief which can be regarded as a part of the case, may with propriety be included in the action.

These views are decisive of the questions presented in this case, and there is no necessity for a more particular reference to the points made by counsel. The objections to the verdict are based upon the distinction at common law between actions of contract and those of tort, and this distinction, and the rules founded upon it, are alike inapplicable to our practice. The plaintiffs have brought their suit upon the whole case, to recover damages, not only for the breach of the contract, but for the wrongs and injuries committed by the owners and agents of the defendant in that connection. The defendant is liable for all the damages resulting from these causes, and there is certainly no impropriety in adjusting the whole matter in one controversy. There was no error in permitting the plaintiffs to give evidence of the fraud practiced in the inception of the contract. The tendency of the evidence on this point was to show a predetermination not to carry out the agreement, and there is no doubt that this was a proper subject of consideration in connection with the tortious acts subsequently committed. If these acts were such as the law could not recognize for the purposes of redress, the admission of this evidence would probably be sufficient to reverse the judgment; but under the circumstances we do not see upon what principle it could have been rejected. It was proper that the whole case should be submitted to the jury, and damages awarded commensurate with the injuries sustained. It was a case of unmitigated hardship, and the acts complained of were not only unnecessary, but without any excuse or palliation whatever. They were acts of willful oppression, and it would be a reproach to the law if nothing could be recovered but the mere pecuniary loss resulting from the breach of the contract.

We think that no principle of law has been violated, and that the jury exercised proper discretion in assessing the damages.

Judgment affirmed.

FIELD, C. J., concurred.

ABOLITION OF DISTINCTION BETWEEN FORMS OF ACTIONS IN CALIFORNIA:
See *Piercy v. Sabin*, 70 Am. Dec. 692; *Sturges v. Burton*, 72 Id. 582, and note
588.

BERNAL v. HOVIOUS.

[17 CALIFORNIA, 541.]

GROWING CROPS ARE NOT "GOODS AND CHATTELS," within the meaning of the section of the statute of frauds which requires immediate delivery, and actual and continued change of possession of goods and chattels, to render a sale valid as against creditors, as they are not susceptible of manual delivery until harvested and reduced to actual possession, and hence they pass by deed or conveyance. The fact, therefore, that after a sale the vendor continues to live on the premises will not render the sale void as against creditors.

AGREEMENT IS NOT LEASE, BUT CONTRACT TO WORK ON SHARES, and the parties are tenants in common until a division be made, where the terms of the agreement, which was entered into verbally between the owner of land and another, are that the latter is to have the land for three years, and to work it, and is to give to the owner therefor one third of the grain raised, after it is put in sacks, free from the expense of thrashing, the owner to furnish farming implements, wagons and horses, and his share of sacks.

SHERIFF HAVING ATTACHMENT MAY LEVY ON DEFENDANT'S INTEREST in a growing crop of grain under a contract to work land on shares; and to effect this, may take and detain possession of the entire quantity of grain; but he can sell under the execution on a judgment that may be recovered only the undivided interest of such defendant, the purchaser at the sale becoming a tenant in common with the owners of the other undivided interests.

ACTION for the possession of certain grain. The opinion states the facts.

Parker and Waterman, for the appellants.

Gough and Wise, for the respondent.

By Court, FIELD, C. J. This is an action for the possession of five hundred and twenty sacks of oats, ninety-three sacks of wheat, and two hundred sacks of barley, alleged to be the property of the plaintiff, and to have been unlawfully taken and detained by the defendants; and arises upon the following

facts: Some time in 1857, one José Maria Vasques entered into a verbal agreement with one Nicholas Bernal in relation to the use and cultivation of a farm situated in San Mateo county. The agreement is called by the parties a lease. The substance of Vasques's testimony with reference to it is, that he leased the premises to Bernal for three years; that the lease was not in writing, but that by its terms he was to furnish the seed, the farming tools and implements, and the wagons and horses, and also the sacks for his share of the grain; and Bernal was to do the work upon the farm, and give him for the use of the land one third of the grain raised, free from the expenses of thrashing—his share to be taken after the grain was put in sacks. Under this agreement, Nicholas Bernal entered upon the premises, and in May, 1860, sold and by deed conveyed his interest in the crops of wheat, oats, and barley, to his brother, John Bernal, the plaintiff in the present action, for the consideration of five hundred dollars. Subsequent to the sale, Nicholas continued to reside upon the premises with his family, as he had done previously, and the plaintiff resided with him. Nicholas, it would seem, on one or two occasions, assisted the plaintiff upon the farm, though the latter took the entire charge and control of the work done, and hired the men employed in harvesting and thrashing the grain.

After the grain had been put up in sacks, but before any division between the plaintiff and Vasques, and whilst it was yet in the field, an attachment was issued against the property of Vasques and Nicholas Bernal, and placed in the hands of the sheriff of San Mateo county, and under it his deputy seized and removed the property in controversy. The defendants are the sheriff and the deputy sheriff, and the present action is for the recovery of the property thus taken. They justify under the attachment. The plaintiff obtained judgment, and hence the present appeal.

There are two questions presented for consideration; the first of which relates to the validity of the sale from Nicholas Bernal to the plaintiff; and the second, to the nature of the interest possessed by the plaintiff in the grain in controversy.

1. The sale is contested, on the ground that the attendant circumstances bring it within the provisions of the fifteenth section of the statute of frauds, which declares that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate deliv-

ery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith." This position is met and answered by the decisions of this court in *Bours v. Webster*, 6 Cal. 661, and in *Vischer v. Webster*, 13 Id. 58. In the first of these cases, the court held that growing crops are not goods and chattels within the meaning of the section quoted, and that they will pass by deed or conveyance from the necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession. In the second case, the tenant purchased the interest of his landlord in a growing crop, and the landlord subsequently resided on the premises and worked for the tenant as a hired man. The grain, after it was harvested and placed in store, was attached as the property of the landlord. The court held that the mere fact that the landlord was on the premises, or in the occupancy of the house thereon, showed no such possession in him as would overcome the clear effect of the deeds showing that he had no right as against the tenant. Following these cases, we are of the opinion that the sale in the case at bar was not vitiated by the fact that the vendor continued to reside upon the farm; and his connection with the crops subsequent to the sale was too slight to justify any inference of a reserved or concealed interest in the property.

2. The agreement for the use of the farm, though designated by the parties as a lease, is not one, in our judgment. It is a contract for the working of the farm upon shares—Vasques of the one part agreeing to furnish the farming implements, the wagons, the horses, and the seed; and Nicholas Bernal, on the other part, agreeing to work on the farm, and to give to Vasques one third the grain after it is put in sacks; and until a division was made between them, the parties were tenants in common of the grain. The agreement is not materially different from the one in the case of *Caswell v. Districh*, 15 Wend. 379. There, it was to let the defendant have the farm for one year, he to sow different kinds of grain and to give the testator a portion of the crops raised; and the court held that the agreement was a letting of the premises upon shares, and that the parties were tenants in common of the crops. The case of *Putnam v. Wise*, 1 Hill (N. Y.), 235 [37 Am. Dec. 309], is a much stronger case than the one at bar, and is conclusive of

the point that Vasques and the plaintiff were tenants in common of the grain to be divided. In that case, the agreement was under seal, and contained the phraseology of a lease reserving rent. Its language was, that the parties of the first part "do by these presents lease, and to farm let" the premises, and that the parties of the second part covenant, in consideration of the use of the land, to "yield, pay, and give one half of all the grain raised by them" on the farm; and the court said: "It is a case in which we ought not to tie ourselves up to the consideration of mere words. The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants than tenants; each party taking an interest as common owners in the crops, and other products, as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor: See *Maverick v. Lewis*, 3 McCord, 211. The extent of such compensation or interest is to be collected from the contract: See *Beaumont v. Crane*, 14 Mass. 400. This may be so framed as to secure an exclusive interest to the owner in certain products, such as the hay to be consumed on the farm; also an exclusive interest in the young animals to be fed there, till they come to be distributed. No doubt any provision of this kind may be made, if not in fraud of the occupant's creditors: *Lewis v. Lyman*, 22 Pick. 437. But there being no such provision, a common ownership results in all products to be divided, in whatever form the provision may be for rendering or securing such products to either party. The true test seems to lie in the question whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a tenancy in common arises, at least in such products as are to be divided." To the same effect is the case of *Dinehart v. Wilson*, 15 Barb. 595. There, the agreement was in the form of a lease, the tenant to deliver to the lessor a certain portion of each crop; and it was also held, the court resting its decision upon the case of *Putnam v. Wise*, 1 Hill (N. Y.), 235 [37 Am. Dec. 309], that until a division was made, the parties were tenants in common of the crops: See also *Harrower v. Heath*, 19 Barb. 331.

These authorities are conclusive upon the second question presented by the defendants. Vasques and the plaintiff were tenants in common of the grain, and in attaching the interest of one of them the sheriff was justified in taking and detain-

ing possession of the entire quantity, though he will not be authorized to sell under the execution on the judgment which may be recovered in that action anything but the undivided one-third interest of Vasques. The purchaser at the sale and the plaintiff will then be tenants in common of the property: *Waldman v. Broder*, 10 Cal. 378.

Judgment reserved, and cause remanded for a new trial.

COPE, J., concurred.

GROWING CROPS, WHETHER CHATTELS OR REALTY, and whether they pass by deed: See *McIlwaine v. Harris*, 64 Am. Dec. 196, and note 197; *Backenstoes v. Stabler*, 75 Id. 592, and note 598.

AGREEMENTS TO WORK LAND ON SHARES, AND RIGHTS OF RESPECTIVE PARTIES in the land and in the crops: See *Putnam v. Wise*, 37 Am. Dec. 309, and note discussing this subject fully 317-323; *Daniels v. Brown*, 69 Id. 505, and note 507. The principal case is cited to the point that, under such agreements, parties are tenants in common until a division of the crop, in *Knox v. Marshall*, 19 Cal. 621; *Walls v. Preston*, 25 Id. 63; *Scott v. Ramsay*, 82 Ind. 334.

SHERIFF IN ATTACHING INTEREST OF CO-TENANT IN PROPERTY may detain possession of the whole property until sale under execution; and a purchaser at such sale would become a tenant in common with the owner of the other interest: *Veach v. Adams*, 51 Cal. 611; *Branch v. Wiseman*, 51 Ind. 3, citing the principal case.

GROWING CROPS ARE NOT CHATTELS WITHIN MEANING OF STATUTE OF FRAUDS, which requires an immediate, actual, and continued change of possession to render sale valid: *Davis v. McFarlane*, 37 Cal. 638, citing the principal case.

TESCHEMACHER v. THOMPSON.

[18 CALIFORNIA, 11.]

MARRIAGE OF EXECUTRIX DIVESTS HER OF AUTHORITY TO ACT under the California statute.

TERMS "USUAL" OR "ORDINARY HIGH-WATER MARK," as applied to tide-waters, are used to designate the limit reached by the neap-tides, that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours.

CEDITION OF TERRITORY FROM ONE GOVERNMENT TO ANOTHER is considered, under the law of nations, independent of treaty stipulations, as passing only public property in and rights of sovereignty over the territory, and does not impair the rights of inhabitants to their property, but they retain all such rights to the same extent as under the former government.

WHEN CALIFORNIA WAS CEDED TO UNITED STATES, the latter, by the treaty of Guadalupe Hidalgo, in effect, stipulated for the protection of the rights of property of the inhabitants in the ceded territory, and thus included such titles to property as were merely equitable, and had never been perfected under the former government.

POWER OF UNITED STATES TO PROVIDE FOR PROTECTING ALL TITLES, legal and equitable, acquired in California from Mexico, prior to the cession of California to the United States, results from the fact that it is sovereign and supreme as to all matters connected with treaties, and the enforcement of obligations incurred thereunder, or cast upon it independent of treaty, by the law of nations, upon the cession of the country.

UNITED STATES MUST DETERMINE FOR ITSELF WHAT CLAIMS TO PROPERTY EXISTED at the date of the cession of a country, which it thereby became bound to protect, and the lands to which they apply, and the parties entitled to the same.

SUBSEQUENT CLAIMANTS FROM UNITED STATES AFTER CESSION OF CALIFORNIA, of lands therein, take in strict subordination to the action of the government, and they are not entitled to any notice of its proceedings. Whatever interests they may possess were acquired with full knowledge of the treaty of Guadalupe Hidalgo, and of the obligations and powers of the new government.

PATENT OF UNITED STATES TO CEDED LANDS formerly belonging to another government is not only the deed of the United States, but is a solemn record of the action and judgment of the government with respect to the validity of the title of the claimant existing at the date of the cession. It declares that the previous grant was genuine; the claim under it valid, and entitled to recognition and confirmation; that the grant was or might have been located by the former government, and that it is correctly located by the new government so as to embrace the premises as they are surveyed and described, and while this declaration remains of record, the government itself cannot question its verity, nor can persons do so who claim through the government by title subsequent.

PATENT TO LAND IN TERRITORY CEDED BY ANOTHER GOVERNMENT TO UNITED STATES is not conclusive against those whose title accrued before the duty of the United States to protect the inhabitants and their property in the ceded territory attached.

PATENT AS DEED OF UNITED STATES TAKES EFFECT only from the date of the presentation of the petition of the patentees for confirmation of their claim. But as a record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant.

IF GRANT OF LAND CEDED TO UNITED STATES by another government, upon which a patent is issued, was one of quantity only, requiring at the cession the action of the government to give it location, the duty devolved upon the new government to make the location, and this was essential to perfect the equitable title of the grantees. As the duty of the government attached at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring.

UNITED STATES PATENT TO CEDED LANDS, issued on grant of former government of quantity only, is evidence that the grantees possessed, at the date of the cession, a vested interest in the quantity of land mentioned in the grant; a right to so much land to be afterwards laid off by official authority; that the premises described were then subject to appropriation in satisfaction of the quantity granted; and that the United States government, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed.

EJECTMENT. The opinion states the facts.

Sidney L. Johnson, for the appellants.

W. T. Gough, for the respondents.

By Court, FIELD, C. J. This is an action of ejectment to recover the possession of certain premises situated in San Mateo county, being part of a tract known as the "San Mateo rancho." The plaintiffs are the executors of the last will and testament of W. D. M. Howard, deceased, and base their claim to a recovery upon a patent of the rancho, issued to them as such executors, and Agnes Howard, executrix, by the United States, bearing date in November, 1857. The patent is based upon a grant of the former Mexican government, in which one of the boundaries of the rancho is designated as the bay of San Francisco, and it conveys the premises in controversy in fee, in the usual form of patents, to the executors and executrix, in trust for the heirs and devisees of the said Howard. Since the issuance of the patent, the executrix has intermarried with one of the plaintiffs, and by the marriage, her authority as such executrix ceased: See act concerning estates of deceased persons, sec. 44. The action, therefore, is properly brought in the name of the plaintiffs: *Curtis v. Sutter*, 15 Cal. 259.

The record does not contain a copy of the Mexican grant, or of the patent of the United States, but we infer, from the argument of counsel, that the grant was one in colonization, and in the ordinary form—subject to the approval of the departmental assembly, and requiring juridical possession from the magistrate of the vicinage; and that the patent of the United States was issued under the act of March 3, 1851, after the usual proceedings before the land commission, and the tribunals of the United States, and the official survey of the premises. It is upon this view we have considered the questions argued by counsel.

The defendants, in their answer as amended, admitted that they were in possession of a part of the demanded premises, and set up, in bar of the action, title in the state of California, alleging, in substance, that the land thus possessed by them was below the ordinary high-tide water-mark of the bay of San Francisco, at the time of the admission of the state into the Union, and has been thus situated ever since, with the exception of that portion occupied by their buildings, which they allege has since been reclaimed from the waters of the

bay by them, or by parties through whom they claim. On the trial, they introduced evidence against the objection of the plaintiffs in support of the allegations of the answer, and the court instructed the jury that if the premises were below the usual high-water mark at the time the state was admitted into the Union, the act of congress and the patent gave the plaintiffs no title, whether the water had receded by the labor of man only, or by alluvion. The jury found for the defendants, and it is from the judgment entered upon their verdict, and from the order refusing the motion made for a new trial, that the appeal is taken.

We are satisfied that the verdict is not justified by the evidence. No instructions were given as to the meaning of the language, "usual high-water mark," and the jury evidently fixed it at the limit which the monthly spring-tides reach—tides which occur only at the full and change of the moon. The term "usual," employed by the court, is ambiguous. The limit of the monthly spring-tides is, in one sense, the usual high-water mark; for, as often as those tides occur, to that limit the flow extends. But it is not the limit to which we refer when we speak of "usual" or "ordinary" high-water mark. By that designation, we mean the limit reached by the neap-tides; that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours. Yet the jury, from want of proper instruction, must have taken a different view, and considered the language as referring to the limit which the monthly spring-tides attained, or else have acted, in rendering their verdict, in mere caprice, as there was no evidence before them, so far as the record discloses, that the neap-tides ever covered the land in controversy: Lord Hall's *Treatise de Jure Maris*, 26; *Lowe v. Govett*, 3 Barn. & Adol. 863; Angell on *Tide Waters*, c. 3; Hale on *Rights to the Sea*.

We do not intend, however, to determine the appeal in this way. We prefer to place our decision upon grounds which will finally dispose of the controversy between the present parties, and furnish a rule for the settlement of other controversies of a similar character. For that purpose, we shall assume that the land occupied by the defendants, and constituting a part of the demanded premises, was, at the date of the admission of California as a state into the Union, below the ordinary high-water mark of the bay of San Francisco; in other words, was covered by the flow of the ordinary or neap

tides of the bay. Upon that assumption, the land thus occupied belonged, at that date, to the state, unless it had been the subject of a previous grant by the Mexican government, which the United States, upon the acquisition of the country, were bound to protect, and which they have since recognized and confirmed. Until the acquisition of the country, the land was of course under the jurisdiction, control, and disposition of the former government, and the rights acquired by the United States were in subordination to the action of that government, so far as such action was entitled to consideration, either from the law of nations or the stipulations of the treaty of cession. In that respect, the land under the tide-waters of the bay between low and high water mark stood in no different position from that of any other land over which the former government possessed the power of disposition.

By the law of nations, independent of treaty stipulations, the cession of territory from one government to another does not impair the rights of the inhabitants to their property. They retain all such rights, and are entitled to protection in them to the same extent as under the former government. Public property and the sovereignty over the territory are only considered as passing by the cession. Thus in *United States v. Percheman*, 7 Pet. 86, the supreme court said: "Had Florida changed its sovereignty by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he has granted were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property." And again in *Strother v. Lucas*, 12 Pet. 435, which was an action of ejectment for certain real estate in Missouri, the same court said: "The state in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of

France, who ceded it to the United States by the treaty of 1803, in full propriety, sovereignty, and dominion as she had acquired and held it (*Foster v. Elam*, 2 Id. 301), etc., by which the government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants: *Soulard v. United States*, 4 Id. 513; *Mitchel v. United States*, 9 Id. 734; *Smith v. United States*, 10 Id. 330, 335; *New Orleans v. United States*, Id. 726, 732, 736. Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect." When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations, those rights, in the language of the supreme court, were "sacred and inviolable," and the obligation passed to the new government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new government, and to be executed by proper legislative action when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals or by existing legislation.

But independent of the obligations arising from the law of nations, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory. By the eighth article, they provided that Mexicans, established in the territory, might remain there or remove to the Mexican republic, and retain their property, or dispose of the same and remove the proceeds. This provision for the retention of the property was an idle and deceptive one, if it did not carry with it a corresponding obligation of the new government to protect the property thus retained. Such obligation it did in fact imply, and this obligation was as sacred and binding as if it were stated in express terms.

The term "property," as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. Such was held by the supreme court to be the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of the ceded territory should be protected in their property. "It comprehends," said the court, in *Soulard v. United States*, 4 Pet. 511, "every species of title, inchoate or complete. It is supposed to em-

brace those rights which are executory, as well as those which are executed. In this respect, the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." And the same court, in a subsequent case, after referring to the same stipulation in the Louisiana treaty, observed that "no principle is better settled in this country than that an inchoate title to lands is property:" *Delassus v. United States*, 9 Id. 133. It matters not, therefore, whether the Mexican grant, upon which the patent of the plaintiffs was issued, passed a perfect title to the premises, or only an interest which required further action of the government for its perfection.

We are not informed by the record whether it was of a specific tract with defined boundaries, or was only of a specific quantity lying in an area of larger extent. We shall assume, for the purposes of the present appeal, that it was of the latter character, and conveyed only an interest requiring further action of the government, and that such action was not had previous to the cession; in other words, that it conferred a merely equitable title, which was never perfected under the former government. The title still constituted property within the decisions of the supreme court, which we have cited, and as such, the government of the United States was under obligation to protect it, by the law of nations and by the stipulations of the treaty. This protection it could extend in its own way. But to protect an equitable title is to perfect it, or to afford the means of its perfection. By the act of March 3, 1851, the government has afforded such means. It has there provided for protecting all titles, legal or equitable, acquired previous to the cession. Its power to thus provide cannot be questioned. The power results from the fact that it is sovereign and supreme as to all matters connected with the treaty, and the enforcement of the obligations incurred thereunder, or cast upon it, independent of the treaty, by the law of nations upon the cession of the country. It must determine for itself what claims to property existed at that date which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims, it must necessarily make them good as against others asserting interests from events subsequently transpiring, otherwise its power to carry out the stipulations of the treaty and the obligations imposed by the law of nations would be limited and dependent, and not sovereign and supreme. Sub-

sequent claimants must therefore take in strict subordination to its action. And such subsequent claimants are not entitled to any notice of its proceedings. The sovereign power can, as we have already observed, afford the requisite protection in its own way; it can do so by a direct legislative act perfecting at once the equitable title, or by authorizing proceedings to be taken before its tribunals and officers; and it is under no more obligation to give notice to parties asserting subsequently acquired interests in the one case than in the other. Nor can subsequent claimants have any just grounds of complaint, for whatever interests they may possess were acquired with full knowledge of the treaty, and of the obligations and powers of the new government.

By the act of March 3, 1851, the government has established a tribunal for the investigation of the validity of the titles asserted to have existed previous to the cession; required evidence to be presented respecting the same; designated law officers to appear and litigate the matter on behalf of the United States; authorized appeals, first to the district and then to the supreme court; and appointed surveyors to survey and measure off the land, when once the title has been recognized and confirmed. By the various proceedings required, numerous securities are afforded against imposition and fraud. As the last act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it, the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent.

The patent, it is true, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the board of land commissioners: *Moore v. Wilkinson*, 13 Cal. 485; *Yount v. Howell*, 14 Id. 469; *Stark v. Barrett*, 15 Id. 386; and *Ely v. Frisbie*, 17 Id. 250. But as

the record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant—such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former government in reference to it; whether it were of a specific tract separated from other lands by defined boundaries, or were only of a specific quantity lying within an area of larger extent; and in the latter case, whether or not the quantity had been located by official authority: *Stark v. Barrett*, 15 Id. 386. The grant upon which the patent to the plaintiff was issued is not set forth, as we have stated, in the record, and we are left in ignorance whether it is of a specific tract or only of a specific quantity. If it be of the former character, it passed to the grantees, upon its issuance, a present and immediate interest in the premises. If it be of the latter character, it passed a like interest in the specific quantity designated, to be afterwards located within the general tract by the authority of the government. If such location were made under the former government, the interest of the grantees became thereby, from its date, attached to the particular tract assigned to them. But if no such proceeding were had under the former government, the right to determine the location passed, upon the cession of the country, with all other public rights, to the United States. The interest therefore held under the grant, at the date of the cession, must have been either in a specific tract, made so by the terms of the grant itself, or by subsequent location under the former government, or in a specific quantity to be laid off by the new government. We have assumed that the grant was one of quantity only, requiring at the time the action of the government to give it location, as this view is the one most favorable to the defendants. Such being the case, the duty devolved upon the new government to make the location. This was essential to perfect the equitable title of the grantees, and thus give it the protection for which the government in effect stipulated by the treaty, and which it was bound to give independent of the treaty, by the law of nations. The duty of the government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring.

The patent, therefore, to the plaintiffs, considered as issued upon a grant of the character which we have assumed it to be, is evidence that the grantees possessed at the date of the cession a vested interest in the quantity of land mentioned in the

grant—a right to so much land to be afterwards laid off by official authority; that the premises in controversy were then subject to appropriation in satisfaction of the quantity granted; and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed. The “third persons,” against whose interest the action of the government and patent are not conclusive—under the fifteenth section of the act of March 3, 1851—are those whose title accrued before the duty of the government and its rights under the treaty attached.

The views we have thus expressed dispose of the present appeal. The United States, upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such equitable claim, the United States would have held the title in trust for the new state; but, the claim existing, the state and all other parties must hold in subordination to the action of the government respecting it. The right and power of the government to protect and thus perfect the equitable claim were superior, as we have shown, to any subsequently acquired rights or claims of the state or of individuals. Immediately upon the cession of the country, the government could have complied with its obligations, and at once have perfected the claim. Subsequent events not originating with the grantees can have no effect upon the validity of their claim, or the duty of the government respecting it.

There is nothing in the decisions of the supreme court of the United States in *Pollard v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 Id. 471, which in any respect militates against these views. The first case was an action of ejectment to recover certain premises situated in the city of Mobile, state of Alabama, constituting part of the shore of a navigable tide-water river, lying below high-water mark, when the state was admitted into the Union in 1819. The plaintiffs relied upon an act of congress, passed subsequently to the admission of the state—in July, 1836—and a patent of the United States issued in pursuance thereof. It was held that the state, upon her admission into the Union, became entitled to the soil under the navigable waters within her limits not previously granted, and that the act of congress and patent were in consequence inoperative to pass any title to the patentees. There was no

pretense in the case, as it was presented to the court, that the patentees had acquired any rights to the demanded premises previous to the admission of Alabama, which the United States were under any obligations, from the law of nations, treaty stipulations, or otherwise, to protect. The question as to the right of soil was presented unembarrassed by any proceedings had respecting the same by any authority existing previous to the admission of the state.

The second case was also an action of ejectment for premises similarly situated, and the plaintiffs claimed under the same act of congress and patent, and also an inchoate Spanish grant dated in December, 1809; but the court affirmed the previous decision in *Pollard v. Hagan*, 3 How. 312, and observed as to the Spanish grant, that it had been repeatedly decided that such grant in that territory, whether inchoate or complete, made after the treaty of St. Ildefonso in 1800, did not convey any right in the soil to the grantee, referring particularly to a recent decision on that point in *United States v. Reynes*, 9 Id. 127. In that case, thus referred to, it was held that the treaty of Ildefonso deprived Spain of the power to make grants of land in Louisiana, if not after its date, certainly after the twenty-first of March, 1801, and that the stipulation in the treaty of Paris, by which Louisiana was acquired, to protect the inhabitants in the enjoyment of their property, had no application to a grant of land made by the Spanish authorities subsequent to that period, and that such grant was void. And hence the court very properly remarked in *Goodtitle v. Kibbe*, 9 Id. 471, that the existence of the imperfect and inoperative Spanish grant, which the plaintiffs in that case produced, could not enlarge the power of the United States over the place in question, after Alabama became a state, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the state; in other words, that the existence of a previous void grant did not enlarge the power of the general government over the premises, and its confirmation by that government, subsequent to the admission of Alabama, did not impair her rights.

The distinction between that case and the one at bar is too obvious to require comment. If the Spanish grant gave any equities to the grantee, as congress by its legislation appeared to consider it did, as stated in the opinion of the supreme court in the case of *Pollard v. Files*, 2 How. 594—a case

which arose upon the same grant, act of congress, and patent mentioned in *Goodtitle v. Kibbe*, 9 Id. 471—the equities were only considerations addressed to the beneficence of the government—reasons for the bestowal of its bounty—and were not founded on claims which the government was under obligation, by treaty stipulations or otherwise, to protect. The claim of the grantees under the grant upon which the patent to the plaintiffs in the case at bar was issued was not upon the beneficence of the government, but upon its sense of justice. The grantees did not ask of the government to confer rights of property, but to respect and settle those already conferred. There is no resemblance in the position of the grantees in the two cases.

Judgment reversed, and cause remanded for a new trial.

COPE, J., concurred.

“SHORE” IS USED TO INDICATE LAND USUALLY OVERFLOWED by neap or ordinary tides: See *People v. Morrill*, 26 Cal. 353, citing the principal case. Land bounded by the sea-shore extends only to the high-tide line: *More v. Massini*, 37 Id. 435, citing the principal case.

ON CESSION OF CALIFORNIA TO UNITED STATES BY GOVERNMENT OF MEXICO, the United States became bound to protect the property, rights, and titles of inhabitants, legal as well as equitable, to the same extent as they were entitled to protection under the former government: *Minturn v. Brower*, 24 Cal. 669; *Leese v. Clark*, 20 Id. 421, 422; *Ward v. Mulford*, 32 Id. 370; *Estrada v. Murphy*, 19 Id. 270, all citing the principal case.

UNITED STATES PATENT IS CONCLUSIVE as against rights arising subsequent to the grant confirmed thereby or to the patent itself: *Henshaw v. Bissell*, 18 Wall. 265; *Weber v. Marshall*, 19 Cal. 458; *Pioche v. Paul*, 22 Id. 111; *Leese v. Clark*, 18 Id. 572, all citing the principal case. The patent takes effect by relation from the date of the filing of the petition for confirmation of petitioner's claim: *Morrill v. Chapman*, 34 Id. 252; and S. C., 35 Id. 83, both citing the principal case.

FRIDENBERG v. PIERSON.

[18 CALIFORNIA, 152.]

JUNIOR ATTACHING CREDITOR CANNOT TAKE ADVANTAGE OF IRREGULARITIES in the affidavit or bond given by a prior attaching creditor of a common debtor. The fact, therefore, that an affidavit omits to aver that the sum for which the writ is asked is “an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the defendant,” does not render the attachment issued a nullity as against subsequent attaching creditors.

WHAT ARE IRREGULARITIES WHICH AVOID ATTACHMENT STATED.

BILL in equity. The opinion states the facts.

S. Heydenfeldt, for the appellants.

H. P. Barber, for the respondent.

By Court, BALDWIN, J. We think that the bill in this case cannot be maintained upon the facts therein stated. The bill is filed to set aside the prior attachments of the defendants—the plaintiff being a junior attaching creditor—upon the ground of the insufficiency of the affidavits of the defendants. The defect is alleged to be the omission to aver that the sums for which the writ is prayed are actual *bona fide* existing debts, due and owing from the debtor, and the omission to state that the attachment was not sought, and the action was not prosecuted to hinder, delay, and defraud creditors of the debtor. It is observable that no charge of fraud is made; nor are these circumstances stated or relied on as proofs of fraud; but it is claimed that the attachments, by reason of these omissions, are nullities; and therefore, the property levied on by them stands unaffected by the proceeding, and subject to the plaintiff's claim. Drake on Attachment, sec. 273, says: "Whatever irregularities may exist in the proceedings of an attaching creditor, it is a well-settled rule that other attaching creditors cannot make themselves parties to those proceedings, for the purpose of defeating them on that account. . . . But where an attachment is based on a fraudulent demand, or one which has in fact no existence, it is otherwise, as will appear from a review of the action of courts of a high order of learning and ability."

What are irregularities within the meaning of the text is illustrated by the cases referred to by the author. Thus in *Foster v. Jones*, 1 McCord, 116, the irregularity consisted in the omission of the plaintiff to make affidavit of his debt before suing out the writ of attachment. In *Chambers v. McKee*, 1 Hill (S. C.), 229, in the omission to give the requisite bond; in *Camberford v. Hall*, 3 McCord, 345, in giving the attachment bond in double the debt, instead of double the damages or sum sued for; in *Kincaid v. Neall*, 3 McCord, 201, in the omission to return the attachment bond; in *Van Arsdale v. Kram*, 9 Mo. 393, for insufficient bond. In some cases, third parties have been allowed to intervene where the debtor was shown not to be subject to the process, or the defendant's property not so subject. But if the defendant does not insist upon the statutory steps being taken in the matter of a bond

or affidavit, in the proper form, we cannot perceive upon what principle a creditor can interfere, any more than in the case of a judgment rendered upon an insufficient complaint or otherwise irregular and reversible: See *Dizey v. Pollock*, 8 Cal. 572; *Patrick v. Montader*, 13 Id. 441.

Judgment reversed, and cause remanded.

COPE, J., concurred.

WHAT IRREGULARITIES AND DEFECTS WILL AVOID ATTACHMENT.—The purpose of this note is to consider what defects and irregularities in proceedings for attachment will render the attachment void, and what will not. There are other causes than such irregularities and defects which will avoid the attachment, as, for instance, the entire, or even partial, failure of plaintiff's cause of action; or falsity of the facts on which the attachment was based, death or bankruptcy of the debtor, and the like. This note, however, will be confined to the head above stated.

It is requisite to attachments in most states, that there should be an affidavit and a bond, and it is for the absence of these, or irregularities in them, or in the writ or return, that attachments will be quashed or avoided, in either a direct or collateral proceeding, as the case may be.

There are many defects, such as mere errors of form, immaterial clerical errors, and the like, which will not render an attachment absolutely void, as they may in the direct proceeding be amended, and will in collateral proceedings be disregarded: 1 *Wade on Attachment*, sec. 3. Such defects, however, where not amendable, are sometimes fatal to the attachment. The subject of amendment of irregularities in attachment proceedings is fully discussed in the note to *Barber v. Swan*, 61 Am. Dec. 125 et seq.

Only those errors or irregularities will avoid the attachment, other than in the direct proceeding, which affect the jurisdiction; for, says Drake, "no doctrine is better settled than that mere errors and irregularities in judicial action cannot be questioned collaterally, but must be corrected by some direct proceeding for that purpose, either before the same court to set them aside, or in an appellate court:" Drake on Attachment, 6th ed., sec. 87 a; *Kempe v. Kennedy*, 5 Cranch, 173; *Thompson v. Tolmie*, 2 Pet. 157; *Voorhees v. United States Bank*, 10 Id. 449; *Harvey v. Tyler*, 2 Wall. 328; *Gibbons v. Bressler*, 61 Ill. 110; *Kruse v. Wilson*, 79 Id. 233; *Augusta Bank v. Jaudon*, 9 La. Ann. 8; *Gilkeson v. Knight*, 71 Mo. 403; *McGavock v. Bell*, 3 Coldw. 512. And such defects must be regarded as cured by final judgment: *Cox v. White*, 2 La. Ann. 422; *Gibson v. Foster*, Id. 507.

Every attempt to overturn an attachment in the direct proceeding, for defects therein which are not jurisdictional, must precede the plea to the merits, for by such plea the defendant is considered to have waived all exceptions to such defects: *Stoney v. McNeill*, 18 Am. Dec. 666; *Gill v. Downs*, 26 Ala. 670; *Watson v. McAllister*, 7 Mart. 368; *Enders v. Steamer Henry Clay*, 8 Rob. (La.) 30; *Garmon v. Barringer*, 2 Dev. & B. 502; *Symons v. Northern*, 4 Jones L. 241; *Memphis R. R. Co. v. Wilcox*, 48 Pa. St. 161; *Judah v. Duncan*, 2 Bailey L. 454; *Young v. Gray*, Harp. L. 38. And the usual method of taking advantage of defects of this kind is by motion to dissolve, set aside, or quash the attachment: *Jordan v. Hazard*, 10 Ala. 221; *Brown v. Coats*, 56 Id. 439. On such a motion, no inquiry into the merits is allowed: *Miller v.*

Chandler, 29 La. Ann. 88. The entertainment of such a motion is within the discretion of the court, and the refusal to entertain it will not be controlled by *mandamus*: *Ex parte Putnam*, 20 Ala. 592; or revised on error: *Reynolds v. Bell*, 3 Id. 57; *Gill v. Downs*, 26 Id. 670; *Watson v. Auerbach*, 57 Id. 353; *Busbin v. Ware*, 69 Id. 279; *Rich v. Thornton*, Id. 473; nor will the decision of the court overruling such motion be revised on appeal: *Massey v. Walker*, 8 Id. 167; *Ellison v. Mounts*, 12 Id. 472; *Mitchell v. Chestnut*, 31 Md. 521; *Baldwin v. Wright*, 3 Gill, 241; *First Nat. Bank v. Weckler*, 51 Md. 30; *Brown v. Ridgway*, 10 Pa. St. 42; *Lindsley v. Malone*, 23 Id. 24. The correctness of the ruling of the court, quashing the attachment on a summary motion of this kind, may, however, be examined on error: *Reynolds v. Bell*, 3 Ala. 57; but not unless reasons for its action are spread on the record, or preserved in the bill of exceptions: *Freeborn v. Glaser*, 10 Cal. 337; *Cobb v. O'Neal*, 1 How. (Miss.) 581.

Where, however, the defects are jurisdictional, they may be taken advantage of at any stage of the proceedings or collaterally, and naturally, if the objection to such defects be well founded, and the defects not amendable, the attachment is ineffective and void.

What are such defects in the affidavit, bond, writ, levy, etc., will be discussed under the respective heads.

The remedy by attachment being a special and extraordinary remedy, strict compliance with all the statutory requisites is necessary: *Pool v. Webster*, 3 Met. 278; *Hughes v. Martin*, 1 Ark. 386; *Grumon v. Raymond*, 6 Am. Dec. 200; *Thornburg v. Hand*, 7 Cal. 554; *Little v. Linnett*, 7 Iowa, 324; *Marrine v. Murphy*, 8 Ind. 272; *McCook v. Willis*, 28 La. Ann. 448; *State Bank v. Histon*, 1 Dev. L. 397; *Sherwood v. Reed*, 7 Hill, 432; *Morrison v. Fake*, 1 Finn. 133; *Greene v. Tripp*, 11 R. I. 424; *Whitney v. Burnetts*, 15 Wis. 61.

THE AFFIDAVIT.—The presence of some affidavit is in most states held to be a jurisdictional requisite. In those states where the affidavit and its sufficiency are so held to be jurisdictional, any irregularities or insufficiencies, other than mere formal defects, will invalidate the writ and be ground for dissolution of the attachment, and are not, like other irregularities, waived by plea to the merits: *Maple v. Tunis*, 53 Am. Dec. 779; *Clark v. Smith*, 1 Ill. 285; *Kruse v. Wilson*, 79 Id. 233; *Halley v. Jackson*, 48 Md. 254; *Hargadine v. Van Horn*, 72 Mo. 370; *Bray v. McCherry*, 55 Id. 128; *Cadwell v. Colgate*, 7 Barb. 253; *Murray v. Hankin*, 65 How. Pr. 511; *Zerega v. Benoist*, 7 Rob. 199; *Endel v. Leibrock*, 33 Ohio St. 254; *Stewart v. Mitchell*, 10 Heisk. 488. In other states, and in cases in some of the same states, the sufficiency of the affidavit, or even the presence of the affidavit itself, is held not to be jurisdictional, and a plea to the merits operate as a waiver of the defects: *Moore v. Mauck*, 79 Ill. 391; *Bailey v. Beadle*, 7 Bush, 383; *Carr v. Van Hosen*, 26 Hun, 316; *Allen v. Meyer*, 73 N. Y. 1. In the state of Alabama, the want of affidavits, even in attachments against non-residents, must be taken advantage of by plea in abatement, and is an irregularity which is waived by judgment for plaintiff: *Jones v. Pope*, 6 Ala. 154.

A statutory requirement of an affidavit before a writ of attachment can issue is sufficiently met by a petition sworn to and containing the necessary allegations requisite to be made in affidavit, and it supplies the place of, and dispenses with, the affidavit: *Scott v. Doneghy*, 17 B. Mon. 321; *Shaffer v. Sundwall*, 33 Id. 579.

Whenever the defendant is personally served with process or appears in an action commenced by attachment, the suit becomes one *in personam* with the added incident that the property attached remains liable, under the control

of the court, to answer such demand as may be established against him by the final judgment of the court: *Cooper v. Reynolds*, 10 Wall. 308; and in such a case, if the defendant makes no question as to the right of the court to exercise jurisdiction over him by attachment, the proceeding, however defective the affidavit, will be valid, for the rights acquired through them will not depend on the attachment for their validity, but on the judgment in the action: *Toland v. Sprague*, 12 Pet. 300.

Under any system requiring an affidavit as the ground for issuing the writ, the issue of a writ being a movement in the exercise of jurisdiction, there is no lawful right to make that movement, unless such ground be laid therefor by affidavit, as the law prescribes: *Drake on Attachment*, sec. 89.

If an affidavit is required by statute, it is the affidavit which brings the power of the court into action; and if there be no affidavit, the whole attachment proceeding is incurably void: *Inman v. Allport*, 65 Ill. 340; *Endel v. Liebrock*, 33 Ohio St. 254. So where the proceedings are attacked on the ground of insufficiency of the affidavit, the attack is made, not on the ground of mere irregularities in the proceedings, but because of the want of a proper foundation for the exercise of jurisdiction by attachment: *Maple v. Tunis*, 53 Am. Dec. 779; *Smith v. Luce*, 14 Wend. 237; *Conrad v. McGee*, 9 Yerg. 428; *Stewart v. Mitchell*, 10 Heisk. 488; *Rumbough v. White*, 11 Id. 260; *Mantz v. Hendley*, 2 Hen. & M. 308; *Whitney v. Brunette*, 15 Wis. 61.

Where by statute an affidavit is required, such affidavit is part of the record: *Staples v. Fairchild*, 3 N. Y. 141; *Maples v. Tunis*, 53 Am. Dec. 779; *Goss v. Commissioners*, 4 Col. 468; *Shivers v. Wilson*, 5 Har. & J. 130; *Ford v. Woodward*, 2 Smed. & M. 260; *Watt v. Carnes*, 4 Heisk. 532; *Conrad v. McGee*, 9 Yerg. 428; and if none appear on the record in case of a collateral attack, no evidence (except perhaps of loss or destruction) is admissible to prove that one was made, and even a recital in the writ to the effect that one was made will not prove the fact nor sustain the proceeding: *Bond v. Patterson*, 1 Blackf. 34; though in *Biggs v. Blue*, 5 McLean, 148, it was held, on collateral attack, where no affidavit appeared on the record, that the court could not presume that there was no affidavit, because none appeared on the record, for the clerk, in copying up the record, might have inadvertently omitted it.

Traverse of Affidavit.—The falsity of the facts stated in the affidavit is not an irregularity in the proceeding, technically speaking, but is more; and in a direct proceeding is ground for setting aside the attachment. It is reached by a motion to dissolve the attachment on traverse of the affidavit, for when the attachment is met by a denial of the truth of the allegations in plaintiff's affidavit, an issue is tendered on the merits of the attachment, and if the alleged grounds on which the attachments are based are found untrue, the attachment is void. But proceedings cannot be collaterally assailed as void by showing the falsity of the affidavit, though the falsity is such as, if raised while the action was pending, would have been ground for quashing the writ: *Weber v. Weitzing*, 3 N. J. Eq. 441.

An affidavit, to be sufficient at all, must be an affidavit in fact, and not a mere irregular paper or statement filed in the case. The statutes are so various that all the requisites and rulings on them cannot be given. But the general tenor of the cases is, that when the statute requires that the affidavit must contain certain matter, such matter must appear in the affidavit, and substantially as required by the statute: 1 *Wade on Attachment*, sec. 56; *Cheadle v. Riddle*, 6 Ark. 480; *Irvin v. Howard*, 37 Ga. 18; *Drake v. Hager*, 10 Iowa, 556; *Dandridge v. Stearns*, 12 Smed. & M. 723; *Gutman v. Virginia I. Co.*, 5 W. Va. 22. The words of the statute need not be followed, but the

words in the affidavit must be equivalent to those in the statute: *Donnell v. Williams*, 21 Hun, 216.

Requisites of Affidavit, Generally.—The requisites to a valid affidavit as the basis of an attachment are generally, in some form or other, and more or less modified as the various statutes differ, that the affidavit shall be entitled, sworn to, and filed, and contain a statement of the amount and nature of the debt, and that it is due, and of the grounds on which the attachment is based, and that the property attached is not exempt.

By Whom to be Made, and Filing and Attestation.—The affidavit must be made by the party authorized by statute to make it (usually the plaintiff, or sometimes his agent acting for him), and as Drake says in his work on attachments, there is ordinarily no difficulty in ascertaining whether it is so made, for the statutory terms are usually sufficiently clear: Drake on Attachment, sec. 93. Where the law requires it to be made by the plaintiff, and mentions no other person by whom it may be made, it is held that the act usually cannot be done by any other person than the plaintiff: *Pool v. Webster*, 3 Met. (Ky.) 278; *Myers v. Lewis*, 1 McMull. 54; *Mantz v. Hendley*, 2 Hen. & M. 306; but see, *contra*, *Flake v. Day*, 22 Ala. 132. Where the affidavit may be made by "plaintiff's attorney," it may be made by an attorney at law as well as by an attorney in fact: *Clark v. Morse*, 16 La. 575; *Austin v. Latham*, 10 Id. 58. Where an agent or attorney may make the affidavit if the principal (the plaintiff) is absent from the county, an omission to state that he is so absent has been held to be a fatal defect: *Pool v. Webster*, 3 Met. (Ky.) 278. Under a statute authorizing the affidavit to be made by the plaintiff or some one for him, it need not state that the party making it did so for plaintiff: *Mandell v. Pett*, 18 Ark. 236; *Gilkeson v. Knight*, 71 Mo. 403; though in Wisconsin the contrary has been held, under a statute authorizing the making of the affidavit by plaintiff or some one in his behalf: *Wiley v. Wisconsin*, 53 Wis. 560; *Müller v. Chicago etc. R. R. Co.*, 58 Id. 310.

An affidavit made under a statute authorizing plaintiff's agent or attorney to make it must describe affiant as such agent or attorney: *Willis v. Lyman*, 22 Tex. 268; *Manley v. Headley*, 10 Kan. 88; but though it is necessary to be so described in the affidavit, the affiant need not swear that he is such agent or attorney: *Weatherwax v. Paine*, 2 Mich. 555; nor, unless required by statute, need it appear why the affidavit was not made by plaintiff: *White v. Stanley*, 29 Ohio St. 423; or that the affiant had personal knowledge of the facts sworn to: *Anderson v. Wehe*, 58 Wis. 615; *White v. Stanley*, 29 Ohio St. 423; or what means he had of knowing such facts: *Gilkeson v. Knight*, 71 Mo. 403. An affidavit by the agent who swore to the facts to the best of his knowledge has been held sufficient: *Bridges v. Williams*, 1 Mart., N. S., 98; and likewise where the affidavit was sworn to on information and belief (*Mitchell v. Pitts*, 61 Ala. 219), because the information was derived from written admissions of the defendant: *Howell v. Kingsbury*, 15 Wis. 193. If the affidavit may be made by another on knowledge and belief of plaintiff, the affidavit is not sufficient if made on the other's own knowledge and belief; he should allege that of plaintiff: *Dean v. Oppenheimer*, 25 Md. 368; *Stewart v. Katz*, 30 Id. 334.

An affidavit should ordinarily be entitled in the suit; and in New York, where the affidavit was not entitled, and failed to make any reference to the parties to the action, it was held too indefinite to be the basis of an attachment: *Burgess v. Stitt*, 12 How. Pr. 401; but in Arkansas it was held otherwise, and a similar affidavit declared sufficient: *Cheadle v. Riddle*, 6 Ark. 480; *Kinney v. Heald*, 17 Id. 397.

The omission of a statement of the venue in an affidavit does not vitiate

it. It is not a fatal defect, but is amendable: *Struthers v. McDowell*, 5 Neb. 491.

Unless expressly required by statute, the absence of the affiant's signature does not prove that he was not sworn, so as to vitiate the attachment: *Redus v. Wofford*, 4 Smed. & M. 579; *Bates v. Robinson*, 8 Iowa, 310; *contra: Cohen v. Manco*, 28 Ga. 27; and will not be fatal if the jurat appears, unless the statute expressly requires signing of the affidavit: *Redus v. Wofford*, 4 Smed. & M. 579; *Bates v. Robinson*, 8 Iowa, 310.

The failure of the clerk to affix a seal to or to properly attest the jurat, though an omission, is not fatal: *Stout v. Folger*, 34 Iowa, 71; *Farrow v. Hayes*, 51 Md. 498; *Simon v. Stetter*, 25 Kan. 155; nor is the omission of the officer to add his official title to his signature: *Singleton v. Wofford*, 14 Ill. 576; nor even, it has been held, will the want of the officer's signature vitiate the attachment, if it certainly appears from the papers that the affidavit was sworn to: *English v. Wall*, 12 Rob. (La.) 132; *McCartney v. Branch Bank*, 3 Ala. 709; though in *Hargadine v. Van Horn*, 72 Mo. 370, it was held that an affidavit which was neither signed by the affiant nor by the clerk, was no affidavit at all, and avoided the attachment; but even failure of an affiant to sign, and of the officer to certify to, the affidavit together did not vitiate the attachment, where the court was satisfied that the affidavit was sworn to: *Stout v. Folger*, 34 Iowa, 71; *Farrow v. Hayes*, 51 Md. 498. But if the implication is not justified from the facts that the paper was sworn to, the absence of the official attestation will be fatal to the attachment: *Birdsen v. McLaren*, 8 Ga. 521; *Cooper v. Smith*, 25 Id. 269; *Watt v. Carnes*, 4 Heisk. 532. An affidavit by a clerk of a court before his own deputy, in a suit in attachment pending in such court, has been held to be a nullity: *Owens v. Jones*, 59 Mo. 89.

Where filing is required by statute, if it appears that there was an affidavit which was not filed, the fact that it was delivered to the officers before the writ issued, and was the ground for its issue, but that the officer failed to file it at the time, will not avoid the attachment, but the facts may be proved and the paper filed *nunc pro tunc*: *Simpson v. Minor*, 1 Blackf. 229.

Amount and Nature of Debt, and Statement of Maturity thereof.—The affidavit, to be sufficient, must state the nature of the demand, at least, and the facts in regard to its maturity: *Lowenheim v. Ireland*, 2 Baxt. 214; *Bartlett v. Ware*, 74 Me. 272; *Quarles v. Robinson*, 1 Chand. 29.

The debt sworn to in the affidavit must be the same as that sued on and stated in the declaration, complaint, or petition: *Cross v. Richardson*, 2 Mart., N. S., 323. And where the sum stated in the affidavit, in the petition, and in the complaint all differed, the attachment was quashed because of the variance: *Joiner v. Perkins*, 59 Tex. 300.

Where the statute requires a statement of the amount due, an affidavit wholly omitting such statement is fatally defective: *Marshall v. Alley*, 25 Tex. 342. It is no objection, however, that the affiant might have claimed a larger sum than he did: *Henrie v. Sweasey*, 5 Blackf. 273. Thus an affidavit stating that at least two thousand dollars is due has been held sufficient to maintain an attachment for the sum of two thousand dollars: *Flower v. Griffith*, 12 La. 345; *contra: Jones v. Webster*, 1 Pinn. 345. If, however, the amount stated is conjectural, it will not support plaintiff's oath, and the attachment will fail, as, for instance, in the case of one partner suing another for a specified amount, as a debt resulting from partnership business, when there has been no settlement of partnership accounts: *Levy v. Levy*, 11 La. 581. Nor will the affidavit be sufficient if the amount stated be speculative

or uncertain on its face, as, "that defendant is indebted in the sum of one thousand six hundred and fifty-seven dollars and ninety cents, as near as deponent can now estimate it;" *Lathrop v. Snyder*, 16 Wis. 293.

Where it is required by statute that the affidavit shall state that plaintiff has a just demand, a failure so to do will avoid the attachment: *Taylor v. Smith*, 17 B. Mon. 536; *Worthington v. Cary*, 1 Met. (Ky.) 470; *Allen v. Brown*, 4 Id. 342; *Bailey v. Beadles*, 7 Bush, 383; *Bray v. McClury*, 55 Mo. 128; but it has been held under such a statute that an affidavit which failed to state that plaintiff's claim was just, but which did state facts that showed the claim to be just, was sufficient: *Wilkins v. Tourtelott*, 28 Kan. 845. It is not ordinarily essential that the amount should be set forth in terms in the affidavit, if the form of pleading be such as to require it to be stated in the petition, and it be there stated, and be referred to in the affidavit as the sum for which the attachment is obtained: *Somberain v. Renaux*, 6 La. Ann. 201; *Boone v. Savage*, 14 La. 169; *Morgan v. Johnson*, 15 Tex. 568.

This, however, would not be the rule where the common-law forms of pleading are preserved. But where the cause of action and the ground of attachment are both required to be set forth in the petition, and the affidavit refers only to the latter, the attachment cannot be sustained, for there is nothing showing, under oath, what amount is due: *Blakely v. Bird*, 12 Iowa, 601; *Kelly v. Donnelly*, 29 Id. 70; *Price v. Merritt*, 13 La. Ann. 526.

In *Zinn v. Dzialynski*, 13 Fla. 597, where the law required the affiant to state "that the amount of debt or sum demanded is actually due," it was held not to mean that the precise amount stated was actually due, but that the day of payment had arrived according to the contract; and that, if the amount shown to be due was sufficient to give the court jurisdiction, the attachment should not be discharged, unless the discrepancy between the amount claimed and the amount proved was so material as to warrant the imputation of fraud or bad faith on the part of the plaintiff.

Where the law required plaintiff to state the sum due, and that no part of the same has been paid, and that he was not indebted to the defendant, it was held sufficient for the plaintiff to state the actual sum due, and that he was indebted to the defendant in a small sum, the amount of which he did not know: *Turner v. McDaniel*, 1 McCord, 552. But see *Morrison v. Ream*, 1 Pinn. 244.

Under a statute requiring the amount justly due to be stated, where the affidavit stated that the defendant "was indebted to the plaintiff in the sum of one thousand dollars, which may be subject to a set-off for an unascertained sum which on final settlement will be due the defendant from plaintiff, for certain improvements," and it was objected that no certain sum was sworn to, the court ruled otherwise, saying that "any debt may be subject to be set off by another debt. But until one debt has been set against another, both remain debts. When there is an action, there can be no set-off until the defendant has done something showing a willingness in him for his debt to be set against the plaintiff's debt." *Holston Mfg. Co. v. Lea*, 18 Ga. 647.

Under statutes requiring a statement of all sums due over and above all counter-claims, it was held that an affidavit that a certain amount is justly due, but omitting to state that it was due over all counter-claims, is fatally defective: *Donnell v. Williams*, 21 Hun, 216; *Ruppert v. Haug*, 87 N. Y. 141; and so an affidavit stating the amount to be due over and above all set-offs and discounts was held insufficient, "counter-claim" having a broader meaning: *Lamplin v. Douglass*, 10 Abb. N. C. 342; but see *Ajford v. Cobb*, 28 Hun, 22. Where the statute required a statement that the sum

was due over and above all counter-claims known to plaintiff, it was held that an affidavit that such was the sum as known to plaintiff is insufficient: *Murray v. Hankin*, 30 Hun, 37; *Cribben v. Schillinger*, Id. 248.

If no statement in the affidavit, as to how the debt accrued, or the nature thereof, is required by statute, absence of such statement is no objection: *Starke v. Marshall*, 3 Ala. 44; *O'Brien v. Daniel*, 2 Blackf. 290; *Irvin v. Howard*, 37 Ga. 18; but if required, failure to state these facts is fatal: *In re Hollingshead*, 6 Wend. 553; *Smith v. Luce*, 14 Id. 237.

So where the statute required it to appear by affidavit that a cause of action exists against the defendant, specifying the amount of the same and the grounds thereof, and the affidavit omitted to state the grounds, it was held that there was no jurisdiction in the court to issue the writ: *Zerega v. Benoit*, 7 Robt. (N. Y.) 199; S. C., 33 How. Pr. 129; *Richter v. Wise*, 6 Thomp. & C. 70. And under the same statute, an attachment was set aside because the affidavit merely recited the facts relied on as a cause of action, without a direct statement of their existence: *Manton v. Poole*, 61 Barb. 330. And under a statute requiring the affidavit to state the nature of the plaintiff's claim, it was considered sufficient to state that the claim was for a certain sum "now due and payable to the plaintiff from the defendants on an account for merchandise sold by the defendants, as auctioneers, on commission, for the plaintiff." *Ferguson v. Smith*, 10 Kan. 394. And so, under a similar statute, an affidavit stating plaintiff's claim to be for the "balance due on account for goods sold and delivered," has been held sufficient: *Theirman v. Vahle*, 32 Ind. 400. Under a statute requiring the nature of the indebtedness to be stated, an affidavit stating that "the debt is one due on a certain instrument in writing, signed by defendant," was held sufficient: *Phelps v. Young*, 1 Ill. 255; *Haywood v. McCrory*, 33 Ind. 459.

Under a statute requiring the plaintiff to show, by affidavit, that one of the causes of action specified in the statute existed against the defendant, and the affidavit alleged that the defendant owed the plaintiff a certain sum for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, it was held not to show a cause of action in favor of the plaintiff, but to be a mere recital, from which the affiant concluded that such a right of action did exist; and that he should have stated that the plaintiff had in fact sold goods, wares, and merchandise to the defendant, of the value of the sum mentioned, or for which the defendant had agreed to pay that sum: *Pomeroy v. Ricketts*, 27 Hun, 242; *Smith v. Davis*, 29 Id. 306. But where the action was upon a promissory note, alleged to be wholly unpaid, it was held sufficient to aver those facts: *Hamilton v. Penney*, Id. 265.

Where the statute provided that the affidavit must state the amount of the indebtedness of the defendant, "and that the same is due upon contract, express or implied," an affidavit was sustained, which stated the amount, and "that the same is due upon contract, express or implied;" it being considered unnecessary to specify the particular description of contract sued upon: *Klent v. Schwalm*, 19 Wis. 111. And under that statute, an affidavit which omitted those words was sustained where it contained an averment of facts, which, if true, constituted an express contract: *Ruthe v. Green Bay & M. R. R. Co.*, 37 Wis. 344.

Grounds of Attachment to be Stated.—The most important point in the affidavit is that which sets forth the grounds on which the attachment is sued out, and it is in reference to that that the mass of the decisions concerning affidavits have been rendered. The decisions are of such number that it will be impossible to cite them all, or the slight variations in them, in this note,

and therefore merely the general propositions established by them will be set out.

It may be said generally that where there are certain statutory grounds to be sworn to, as there are in most states, one or more must appear in the affidavit, or it will not warrant the issuance of the writ: *Ex parte Chapman*, 1 Wend. 66; *Boyd v. Buckingham*, 10 Humph. 434. A full statement of the statutory grounds which will justify the issuance of an attachment in each state will be found in 1 Wade on Attachment, sec. 74, note.

A party may set out in his affidavit as many grounds as the law allows: *Kenson v. Evans*, 36 Ga. 89; *Irvin v. Howard*, 37 Id. 18; and if any of the grounds stated are true, the attachment will be sustained, though the others are bad: *McCullen v. White*, 23 Ind. 43; *Lawyer v. Langhaus*, 85 Id. 138; *Rosenheim v. Fifield*, 12 Bradw. 302. So if several grounds of attachment are stated, and all are successfully contested, save one, which is left uncontested, that one will sustain the attachment: *Keith v. Stetter*, 25 Kan. 100. So if one ground be good and sufficiently sworn to, though the other grounds stated are not sworn to, the attachment will be sustained: *Dunlap v. McFarland*, 25 Id. 488.

Grounds of attachment must not be stated so that they would, if all included, be inconsistent, for then the attachment would be defective for uncertainty: *Damenbaum v. Schram*, 59 Tex. 281. And so an affidavit alleging one or another of two distinct grounds of attachment will be bad for uncertainty, as it would be impossible to determine which would be relied on to sustain the attachment. And affidavits thus in the disjunctive will be bad though either of the facts sworn to might be sufficient: *Devall v. Taylor*, Cheves, 5; *Hagood v. Hunter*, 1 McCord, 511; *Dickenson v. Cowley*, 15 Kan. 269; *Kegel v. Schrenkeisen*, 37 Mich. 174; *Bishop v. Fennerty*, 46 Miss. 570; *Haynes v. Powell*, 1 Lea, 347. Though, of course, the statute may authorize grounds to be stated in the alternative.

In some states, an attachment issues as a matter of right upon affidavit being made of the existence of certain facts, while in others it is required that the officer shall be satisfied, by affidavit presented to him, of the existence of such facts. In the former case, the officer's duty is merely ministerial, involving no inquiry on his part, except as to whether particular facts are sworn to; in the latter, his functions are judicial as well as ministerial; he must be satisfied judicially, by the affidavit, not merely that the facts are sworn to, but that the evidence is sufficient to prove that they really exist. This subject may be considered under different statutes, in three distinct phases: 1. Where the affidavit is required simply to state the existence of a particular fact, declared by law to be a ground of attachment; 2. Where the existence of such fact must be proved to the satisfaction of some named officer; and 3. Where the officer must be satisfied of the existence of such fact, by proof presented to him of the facts and circumstances which go to establish its existence: Drake on Attachment, sec. 87, c. 97, 98, 99, 100.

Where the affidavit must state simply the existence of a particular fact as a ground of attachment, nothing is requisite but a substantial conformity to the language of the statute. The officer need not be satisfied judicially that the alleged fact is true, but is simply to see that it is sworn to: *Wheeler v. Farmer*, 38 Cal. 203; *Reyburn v. Brackett*, 2 Kan. 227; *Crawford v. Roberts*, 8 Or. 324; *Dunlevy v. Schartz*, 17 Ohio St. 640; *Garner v. White*, 23 Id. 192.

Where the existence of the ground of attachment must be proved to the satisfaction of the officer, the officer acts in a judicial as well as in a ministerial capacity, and he must, before he issues the writ, satisfy himself that

the facts essential under the statute to the issuance of the writ, exist, and if the record does not show that he was so satisfied, the attachment will be quashed: *Mayhew v. Dudley*, 1 Pinn. 95; *Morrison v. Fake*, Id. 133. And such proof in the absence of any further statutory requisite must be by legal evidence: *Brown v. Hinchman*, 9 Johns. 75.

Where the officer must be satisfied of the existence of the ground of attachment by proof of particular facts and circumstances tending to establish its existence, the officer acts both in a judicial and ministerial capacity, as he must pass both on the competency of the evidence and upon the sufficiency of the proof to establish the existence of the ground of attachment. And to defeat an attachment for want of jurisdiction of the officer to issue the writ, because the affidavit did not show such facts, it must appear that there is a total want of evidence on some essential point: *Schoonmaker v. Spencer*, 54 N. Y. 366. And therefore where a statute contains such a requisite, an affidavit which merely states the necessary matters on belief, or information and belief, is insufficient: *Smith v. Luce*, 14 Wend. 237; *Pierce v. Smith*, 1 Minn. 82; *In re Brown*, 21 Wend. 316; *Ex parte Robinson*, Id. 672; *Kingsland v. Cowman*, 5 Hill, 608; *Lorrain v. Higgins*, 2 Chand. 116.

Where, by statute, an attachment is allowed when the defendant has to act with a certain intent, unless such intent be stated the affidavit will not support the attachment: *Crayne v. Wells*, 2 Bradw. 574. So where the affidavit should show that the act of the defendant was attended with a specified result, a failure to so state such result will avoid the attachment: *Napper v. Noland*, 9 Port. 218; *Thompson v. Chambers*, 12 Smed. & M. 488.

Uncertainty, Surplusage, etc.—Uncertainty may likewise vitiate the attachment, as if the party does not swear positively as to his demand, which the law requires to be on a contract, but states facts from which perhaps a jury might infer a contract: *Jacoby v. Gogell*, 5 Serg. & R. 450; or where the statement is made on information and belief: *Neal v. Gordon*, 60 Ga. 112; *Merrill v. Low*, 1 Pinn. 221.

Surplusage will not vitiate the attachment, if not inconsistent with the substantial averments required by statute: *Spear v. King*, 6 Smed. & M. 276; *Farley v. Farior*, 6 La. Ann. 725; *Emmet v. Yeigh*, 12 Ohio St. 335.

Numerous other instances of insufficient affidavits might be given, as the particular facts and the statutes vary in almost every case, but the space will not permit. A full collection of special cases of insufficient affidavits will be found in Drake on Attachment, 6th ed., secs. 106 et seq.

THE BOND.—The laws of most of the states require a bond as a condition precedent to the issue of the writ. Where this is so, it is as imperative that a bond should be filed as that the plaintiff should file an affidavit: *Alabama Bank v. Fitzpatrick*, 4 Humph. 311; and its absence would be a jurisdictional defect rendering the subsequent proceedings void: *Van Loon v. Lyons*, 61 N. Y. 22; *Tiffany v. Lord*, 65 Id. 310; *Graham v. Burckhalter*, 2 La. Ann. 415; *Ford v. Hurd*, 4 Smed. & M. 683. In Alabama, the want of a bond, even against a non-resident, must be taken advantage of by plea in abatement, and is an irregularity which is waived by plea in abatement: *Jones v. Pope*, 6 Ala. 154. Yet the bond and the affidavit do not occupy the same position, the bond being more generally amendable. They therefore do not furnish any ground for quashing the attachment, unless plaintiff refuses to furnish a good and sufficient undertaking within such time as the court may direct after objection taken thereto: *Gopen v. Stephenson*, 18 Kan. 140; *Scott v. Macey*, 3 Ala. 250; *McDonald v. Fiet*, 53 Mo. 343. But a failure to so perfect the bond is an irregularity for which the attachment may be quashed: *Alford v. Johnson*, 9 Port. 320.

Where the statute prescribes a form of bond, such form should be followed: *Simon v. Stetter*, 25 Kan. 155; and this form is sometimes regarded as exclusive of any other: *Amos v. Almet*, 2 Smed. & M. 215; though a common-law bond has been held sufficient: *Barnes v. Webster*, 57 Am. Dec. 232. Where a bond is required, the court cannot take money or other valuable securities in lieu thereof: *Bate v. McDonald*, 41 Hun, 219. The bond must, of course, have all the ordinary requisites of a bond in a judicial proceeding, and it is not necessary to set forth those requisites here. Where no form is prescribed, a bond to pay all damages sustained by defendant, by any illegal conduct of the plaintiff, was held sufficient: *Leach v. Thomas*, 2 McCord, 110. Where the bond is regarded as jurisdictional, the omission or insufficiency thereof are not waived by plea to the merits: *Tyson v. Hamer*, 2 How. (Miss.) 669; but such a plea will be a waiver to the objections, on account of defects which might have been amended at an earlier stage of the proceedings: *Voorhees v. Hoagland*, 6 Blackf. 232; *Young v. Gray*, Harp. 38. A bond is insufficient when it fails to furnish the full statutory indemnity; 1 Wade on Attachment, sec. 114.

WRIT, AND EXECUTION AND RETURN THEREOF.—The necessity for the filing of an affidavit and bond as a prerequisite to the issuance of the writ has already been discussed. Suffice it to say that where these matters are jurisdictional, a writ issued in advance of the filing of the affidavit and bond is void: *Ely v. Guest*, 94 Pa. St. 160. And where the statute requires the declaration or complaint to be filed as a prerequisite to issuance of the writ, an attachment will be void where the writ issues in advance of the declaration: *Siebert v. Switzer*, 35 Ohio St. 661. Where, however, the filing of the affidavit, bond, and declaration are prerequisites to issuance of the writ, it is sufficient if all are filed at the same time, and contemporaneously with the issuance of the writ: *Wheeler v. Farmer*, 38 Cal. 203. It has been held that the summons need not be served before the writ issues: *Wallace v. Castle*, 68 N. Y. 370. But it is said that on non-residents, the summons must be served in statutory form before the writ issues, and that unless this is done, the levy will be void, and that although the subsequent issue of summons will cure the writ, it will not cure the levy: *Zerega v. Benoist*, 7 Rob. (N. Y.) 199. It is requisite, however, in most states, that the action be commenced and pending at the time of issuance of the writ: *Steel v. Harkness*, 9 W. Va. 13.

To authorize the issuance of the writ, the bond and affidavit need only be sufficient on their face: *De Coussey v. Bailey*, 57 Tex. 665. Where, however, under the statute, certain facts must be proved to authorize a court to issue the writ, and there is a total defect as to such proof, the process is void: *Miller v. Brinckerhoff*, 47 Am. Dec. 242; *Slaughter v. Bevans*, 1 Pinn. 348; and see cases cited *supra*, on this head.

Where the statute requires a recital in the writ that the bond has been approved and filed, it has been held that a recital that it has been filed will be equivalent to a statement of its approval: *Marnine v. Murphy*, 8 Ind. 272; *Levy v. Darling*, 23 Id. 497.

The issue of a writ on Sunday is at common law an irregularity which, if apparent on the face of the writ, will justify the quashing of it, but if not so apparent, the validity of the writ will not be affected, and in such case the court cannot order the clerk to alter the date of the writ to make it show that it was issued on Sunday, and then quash it: *Matthews v. Ansley*, 31 Ala. 20.

Misrecital in the writ, of the court to which it is returnable, is no ground for dissolving the attachment where the nature and character of the writ show that it could be returnable only in a particular court: *Byrd v. Hopkins*, 8

Smed. & M. 441; *Wharton v. Conger*, 9 Id. 510; and much less where the writ is actually returned into the proper court: *Blake v. Camp*, 45 Ga. 298. Where the writ was made returnable to a term of court that had passed, though the error was a clerical one, it was held void: *Dames v. Fales*, 3 N. H. 70; but even this was held amendable: *Scott v. Macy*, 3 Ala. 250.

A writ not officially signed or attested is void: *Wiley v. Bennett*, 9 Baxt. 581.

A levy before issue of the writ is void: *Wilson v. Striker*, 66 Ga. 575; *Wales v. Clark*, 43 Conn. 183.

The officer executing the writ should omit no act which the governing statute prescribes in regard to the levy: *Desha v. Baker*, 3 Ark. 509; *Sharp v. Baird*, 43 Cal. 577; *Gates v. Bushnell*, 9 Conn. 530; *Kuhn v. Graves*, 9 Iowa, 303; *Crowninshield v. Strobel*, 2 Brev. 80. Where the statute requires reading, all of the writ must be read to be an effectual service: *Crary v. Barber*, 1 Col. 172. A writ served on Sunday is void in Alabama: *Colton v. Huey*, 4 Ala. 56. Insufficiency of service of the writ, in Louisiana, is held to be an irregularity which, though available in the direct proceeding, cannot be taken advantage of collaterally: *Cox v. White*, 2 La. 422; *Gibson v. Foster*, Id. 507. A levy is not bad because made on property of more or less value than the sum named in the writ, but if too much, the defendant may have the amount of property subjected to the attachment reduced: *Thornton v. Winter*, 9 Ala. 613; *Hughes v. Tennison*, 3 Tenn. Ch. 641. Levy deferred until after return of the writ is absolutely void: *Peters v. Conway*, 4 Bush, 565. The same rules applicable to the service and return of process generally, and to the levy and return of executions, applies to the levy and return of writs of attachment. As to the matter of amendment of writs of attachment, and the levy and return thereof, see *Barber v. Swan*, 61 Am. Dec. 125. In Alabama, the doctrine of waiver by appearance is carried to the length of curing defects in the writ, which would be sufficient to render the attachment void: *Goldsmith v. Stetson*, 39 Ala. 183.

RIGHT OF THIRD PERSONS TO ATTACK ATTACHMENT.—Third persons, including other attaching creditors, cannot intervene in an attachment proceeding to have it set aside for irregularities of procedure: *Emerson v. Fox*, 2 La. 178; *Van Arsdale v. Krum*, 9 Mo. 397; *Rudolf v. McDonald*, 6 Neb. 163; *In re Griswold*, 13 Barb. 412; *Ward v. Howard*, 12 Ohio St. 158; *Walker v. Roberts*, 4 Rich. 561; *Kincaid v. Neall*, 3 McCord, 201; nor will a waiver by the defendant operate to the advantage of the subsequent attaching creditors, where they are not substantially injured by such waiver: *Rudolf v. McDonald*, 6 Neb. 163. But, as stated in the principal case, if the attachment is based on a fraudulent demand, or on one which has in fact no existence, it is otherwise: *Harrison v. Pender*, Bush, 78; *Bank v. Spurling*, 7 Jones, 398.

SOULE v. ATKINSON.

[18 CALIFORNIA, 225.]

AGREEMENT TO KEEP PARTNERSHIP SECRET, and its mere concealment from plaintiff, who sold goods to one of the firm individually, which goods went to the uses of the concern, does not amount to such a fraud as will avoid the statute of limitations against plaintiff, who did not discover the partnership until after the bar of the statute had operated against him.

ACTION on a contract. Three persons, Atkinson, Ranlett, and Homer had entered into a partnership agreement, by the terms of which the partnership was to be kept secret, and plaintiff, ignorant of the existence of the partnership, sold goods to Homer individually, in 1854. Afterwards, in 1860, discovering that the partnership existed in 1854, and that the goods went to the uses of the concern, he brought suit against the three partners. Defendants demurred, setting up the bar of the statute of limitations. Demurrer sustained. Plaintiff appealed.

Heydenfeldt, for the appellant.

Whitcomb, Pringle and Felton, and Waller and Moore, for the respondents.

By Court, BALDWIN, J. It is conceded that the plea of the statute of limitations would be good in this case, unless this effect be denied in consequence of the fact that the defendants, partners, were not known as such to the plaintiffs, and that, by an article of the partnership agreement between them and the ostensible partner, their relation was to be kept secret. It is argued that this concealment of the partnership by the dormant partners, effected in this way, was a fraud which prevents the running of the statute in their favor. Waiving for the present the consideration that this agreement and concealment are not shown to have been made or done with the intent of deceiving or defrauding the plaintiff, we think the argument of the respondents' counsel conclusive to show that neither this agreement, nor this concealment, nor both together, amounts to such a fraud as maintains the pretension of the plaintiff. A dormant partner is not bound to give notice of his relations to the firm of which he is a member. No credit is given on the strength of his connection with the firm. The very name which describes his character implies that his relations to the firm are secret. Many justifiable reasons may exist for his keeping a knowledge of his connection with the firm from being made public, while no injury is necessarily done to any one from a failure to disclose it. The many cases cited by the respondents' counsel show that the mere concealment by the dormant partner of this fact is not fraudulent. If this be so, the conclusion is irresistible that it cannot be a fraud to agree to do what, when done, is innocent, or at least, not legally culpable.

It is not necessary to examine the other questions, for this one is decisive.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

DORMANT PARTNERS, RIGHTS AND LIABILITIES OF, GENERALLY: See *Brooks v. Washington*, 56 Am. Dec. 147-151, note, where the subject is extensively discussed; and see *Bromley v. Elliott*, 75 Id. 183. and note.

BRUMAGIM v. TILLINGHAST.

[18 CALIFORNIA, 265.]

IN SO FAR AS IT IMPOSES TAX UPON BILLS OF LADING for the transportation of gold or silver from any point in this state to any point without the state, the act of the California legislature of April, 1858, amending the act of April, 1857, "to provide for the support of the government of this state from a tax to be levied and collected from foreign and inland bills and other matters," is in conflict with that clause of the constitution of the United States which declares that "no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and hence the provisions of the act must be restricted to the enforcement of the tax against instruments other than such bills of lading.

PAYMENT IS VOLUNTARY AND CANNOT BE RECOVERED BACK, where made to the treasurer of the city and county of San Francisco to purchase stamps, under the California act of 1857, as amended by the act of 1858, to put on bills of lading for the transportation of gold or silver by steamer from that city to New York, notwithstanding such act be unconstitutional. As the act of 1857, as amended, required stamps to be deposited with the treasurer for sale, and as he had no authority to compel persons to purchase them, the fact that the owners and agents of the steamers refused to issue bills of lading without the stamps does not show any coercion on the part of the treasurer.

MONEY VOLUNTARILY PAID UPON CLAIM OF RIGHT with full knowledge of all the facts cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment.

TO CONSTITUTE SUCH COMPELSION OR COERCION AS WILL RENDER PAYMENT INVOLUNTARY, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no means of immediate relief than by advancing the money.

FACT THAT PARTY PAYS MONEY UNDER PROTEST does not change the character of the transaction or enable him to recover it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation. The object of a protest in such cases is to take from the

payment its voluntary character, and thus conserve to the party a right of action to recover back the money. But where no such compulsion exists, or no advantage is taken, there is no case for its interposition. If the payment is in truth voluntary, no language used on the occasion can change its character.

RULE THAT "MONEYS VOLUNTARILY PAID UPON CLAIM OF RIGHT cannot be recovered back" has exceptions. Per Cope, J.

ACTION to recover back moneys alleged to have been involuntarily paid. The opinion states the facts.

Crockett and Crittenden, for the appellants.

C. Temple Emmet, for the respondent.

By Court, FIELD, C. J. The act of the legislature of April, 1858, amendatory of the act of April, 1857, "to provide revenue for the support of the government of this state, from a tax to be levied and collected from foreign and inland bills, and other matters," imposes upon bills of lading for the transportation of gold or silver coin, gold-dust, or gold or silver in bars, or other form, from any point or place in this state to any point or place without the state, a stamp tax of thirty cents on the first one hundred dollars of the value of the property transported, and of one fifth of one per cent upon the amount of its valuation exceeding that sum, and requires that there shall be attached to each bill of lading, or stamped thereon, a stamp or stamps expressing in value the amount of such tax. The original act of 1857 constitutes the governor, treasurer, and secretary of state commissioners of stamp duties, and in substance provides that they shall cause stamped paper or stamps, corresponding with the several rates of duties prescribed by the act, to be prepared and delivered to the controller, to be by him distributed to the several county treasurers for sale. The original act also declares all contracts or instruments of writing executed after the first of July, 1857, charged with the payment of a stamp tax, absolutely void, unless stamped or marked as prescribed therein, and makes the issuance of any such instruments without the stamp a misdemeanor punishable by fine. The plaintiffs are bankers, engaged in the regular course of their business in shipping gold and silver coin, gold and silver in bars, and gold-dust from the port of San Francisco, in this state, to the port of New York, in the state of New York, and to foreign ports; and the present action is brought to recover two thousand and thirty-one dollars, alleged to have been paid by them to the defendant, who was treasurer of the city and county of San

1857, for the enforcement of the stamp tax, must be restricted in their application to other instruments than such bills of lading.

2. The solution of the second question presented depends upon the character of the payments—whether they were voluntary, or made under compulsion or coercion. Notwithstanding some doubts suggested in the early cases on the subject, the rule is at this day well settled, that moneys voluntarily paid upon a claim of right, with full knowledge of all the facts, cannot be recovered back, merely because the party, at the time of payment, was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes, of itself, no ground for relief.

There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character. "every man," as said Lord Ellenborough in *Bilbie v. Lumley*, 2 East, 472, "must be taken to be cognizant of the law; otherwise, there is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case." *Fulham v. Down*, 6 Esp. 26, note; *Brisbane v. Dacres*, 5 Taunt. 144. Relief against mistakes in law is refused upon the principle, said the supreme court of New York in *Clarke v. Dutcher*, 9 Cow. 674, "that in judgment of law there is no mistake, every man being held, for the wisest reason, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it." In that case, it was held, after an elaborate examination of the English authorities, that where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. "He shall not be permitted," said the court, "to allege his ignorance of law; and it shall be considered a voluntary payment." See also *Preston v. Boston*, 12 Pick. 7; *Boston and Sandwich Glass Co. v. City of Boston*, 4 Met. 189; *Forbes v. Appleton*, 5 Cush. 117; *Benson*

v. *Monroe*, 7 Id. 125 [54 Am. Dec. 716]; *Chase v. Dwinal*, 7 Me. 134 [20 Am. Dec. 352]; *Smith v. Readfield*, 27 Id. 145; *Mays v. Cincinnati*, 1 Ohio St. 268; *Mayor etc. of Baltimore v. Lefferman*, 4 Gill, 425 [45 Am. Dec. 145]; *Robinson v. City Council of Charleston*, 2 Rich. L. 317; *Mowatt v. Wright*, 1 Wend, 355 [19 Am. Dec. 508]; *Wyman v. Farnsworth*, 3 Barb. 370; and *Elliott v. Swartwout*, 10 Pet. 138.

What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary, may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. In *Forbes v. Appleton*, 5 Cush. 117, a payment of money was made in order to prevent the obligee in a bottomry bond from attempting to enforce the same by taking possession of the vessel, and the court held that it was not a compulsory but a voluntary payment; and if the money was not due, the debtor had no right of action to recover it back, although he declared at the time of payment that he made it under coercion, and intended to reclaim the same by action. "The principle of law," said the court, "is a very familiar and a very salutary one, that where a person with full knowledge of all the circumstances pays money voluntarily under a claim of right, he shall not afterwards recover back the money so paid. To avoid the application of the rule in the present case, it must appear that the plaintiff was compelled, by duress of his person or goods, to pay the same. In general, the cases that have been treated as exceptions are cases where the possession of the property upon which the lien was claimed was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment, or his property from sale, on execution or warrant of distress, but by paying the money demanded." In the case of *Mayor and City Council of Baltimore v. Lefferman*, 4 Gill, 425 [45 Am. Dec. 145], the court of appeals of Maryland concludes an examination of numerous authorities on the subject of compulsory payments, by stating that it considers "the doctrine as established that a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress, imposed upon it by the party to whom

the money is paid." And in *Mays v. Cincinnati*, 1 Ohio St. 268, the supreme court of Ohio concludes a like examination by observing that "this unbroken chain of authority seems to warrant the conclusion that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it."

Tested by these authorities, the question presented is one of easy solution. The complaint does not show that the payments to the defendant for the stamps were the result of any coercion on his part. It only alleges that, in the ordinary course of trade, shipments of gold and silver to New York were made by lines of ocean steamers plying between San Francisco and Panama, and connecting with lines of steamers plying between Aspinwall and New York; that they afforded the only safe and speedy means by which such shipments could be made; that the owners, agents, and masters of those lines refused to issue bills of lading, unless the same were first stamped, in pursuance of the act of 1858; that in order to procure bills of lading for the shipments made by them, the plaintiffs were forced to apply to the defendant, as county treasurer, for the purchase of the requisite stamps to be affixed to the bills, and did purchase the same from him at the prices designated in the act, which he demanded; that they protested at the time against the right of the defendant to exact payment for the stamps, and against the acts of the legislature as unconstitutional and void, and gave notice that they would hold him responsible for the moneys paid. No facts are here stated showing any compulsion or coercion by the defendant. The only compulsion or coercion, in fact, alleged comes from another source—from the masters, agents, and owners of the steamers, from their refusal to issue the bills of lading unless previously stamped. But this conduct of third parties cannot be resorted to for the purpose of fastening liability upon the defendant. Unless he has personally done some act which the law condemns, he cannot be charged, no matter how arbitrarily or improperly others may have acted. Suppose the owners or agents of the steamers had refused to issue the bills of lading required until the plaintiffs made purchases of other articles than stamps, or bestowed certain bounties, and they

had complied with these conditions, no one would pretend that an action could subsequently be maintained by the plaintiffs against the vendors in the one case, or the recipients of the bounties in the other. to recover back the money with which they had parted.

But the case supposed and the case at bar are not materially different. The refusal to issue the bills of lading might as well have been placed on the one ground as the other. The existence of the act of 1858, it is true, induced the conduct of the agents and owners of the steamers, but the justification of their conduct falls with the constitutionality of the act. That conduct, as we have observed, could not affect the action of the defendant. He was intrusted with a certain quantity of stamps, and authorized to dispose of them to applicants at a fixed price. If the price were paid, he delivered the stamps, but if not paid, he retained them in his possession. The plaintiffs were at liberty, so far as he was concerned, to purchase or decline purchasing. He was not invested with power to compel them to purchase, nor to punish them if they chose to refrain from purchasing. Nor was he in possession of any of their property, the delivery of which they could not obtain without such payment. Under these circumstances, the payments made by them were, in the eye of the law, voluntary payments. They were acquainted with all the facts, and the case was not one which admitted of false representations as to the position or power of the defendant. The gist of the whole matter, as alleged by the plaintiffs, is simply this: They doubted as to the constitutionality of the act of the legislature, and therefore voluntarily purchased the stamps, preferring this course, as one of convenience, to taking proceedings against the owners or agents of the vessels who refused the bills of lading unless stamped. The protest accompanying the purchase and payment of the money did not change the character of the transaction. A protest is available, as we said in *McMillan v. Richards*, 9 Cal. 417 [70 Am. Dec. 655], only in cases of payment under duress or coercion, or where undue advantage is taken of one's situation. In such cases, its object is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. But where no such compulsion exists, or advantage is taken, there is no case for its interposition, and the character of the payment is unaffected by it: *Fleetwood v. City of New York*, 2 Sandf. 476. If the payment were in truth

voluntary, no language used on the occasion would change its character.

Judgment affirmed.

BALDWIN, J. I concur in the opinion of the chief justice. I think that the facts of this case bring the question within the general proposition laid down, and that proposition, as limited and explained by the facts, and the entire reasoning of the opinion—as all general propositions must be—is not too broadly stated.

COPE, J. I concur in the judgment of affirmance, and generally in the views expressed in the opinion of the chief justice. I think the proposition that “moneys voluntarily paid, upon a claim of right, with full knowledge of the facts, cannot be recovered back,” too broadly stated. There are, in my judgment, exceptions to that rule, but I do not regard the present case as falling within them.

MONEY PAID UNDER COMPELSION, WHAT IS, AND WHEN MAY BE RECOVERED BACK: See extensive note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 153-171; and see other cases cited on this head, and also as to the effect of payment under protest: *McMillan v. Richards*, 70 Id. 655, and note 675. The principal case is cited in *Radich v. Hutchins*, 95 U. S. 213, to the point that a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual or existing duress imposed upon it by the party to whom the money is paid. In *Garrison v. Tillinghast*, 18 Cal. 407, and *Bucknall v. Story*, 46 Id. 599, S. C., 13 Am. Rep. 225, the principal case is cited to the same effect, and it is asserted that there must certainly be some actual coercion or duress compelling the payment of an illegal demand in order to justify a recovery.

STATES HAVE NO POWER, BY DIRECT LEGISLATION, TO REGULATE INTER-STATE COMMERCE: See *Carson Rev. L. Co. v. Patterson*, 33 Cal. 340; *People v. Raymond*, 34 Id. 498, both citing the principal case.

DAVIS v. EPPINGER.

[18 CALIFORNIA, 373.]

ATTACHMENT ISSUED UPON DEBT NOT DUE IS VOID as against creditors whose rights are injuriously affected by it.

ATTACHMENT ISSUED ON DEBT WHICH WAS EQUITABLY DUE is valid.

NOTE PAYABLE ONE DAY AFTER DATE WITHOUT GRACE cannot be sued on the day after its execution.

JUDGMENT CREDITORS OF DEFENDANT IN ATTACHMENT SUIT MAY INTERVENE for the purpose of setting aside the attachment because void as to them.

INTERVENTION to set aside attachment. The opinion states the facts.

R. C. Clark, for the appellants.

Frank Hereford, for the respondent.

By Court, COPE, J. This is a proceeding by attachment to recover the amount of a promissory note executed by the defendant Eppinger. The note was drawn payable one day after date without grace, and the suit was commenced on the day following its execution. The attachment was issued at the commencement of the suit, and levied upon all the property of which Eppinger was the owner. A petition of intervention was filed by certain judgment creditors of Eppinger, seeking relief against the attachment.

If the intervenors have any rights in the premises, we are satisfied that they have pursued the proper remedy. On this point, it is only necessary to refer to previous decisions of this court, in which the subject has been fully considered: *Yuba County v. Adams*, 7 Cal. 35; *Dixey v. Pollock*, 8 Id. 570. The point in relation to the commencement of the suit has also been settled by this court, and there is no doubt that the action was prematurely brought: *Wilcombe v. Dodge*, 3 Id. 260 [58 Am. Dec. 411]; *McFarland v. Pico*, 8 Id. 626. The objections to the judgment, under which the intervenors claim, are of too frivolous a nature to require notice.

The only question of importance is, whether the plaintiff acquired, by his attachment a valid lien upon the property of Eppinger. If he did not, the intervenors are undoubtedly entitled to relief; and our opinion, upon a careful examination of the question, is that he did not. He relies upon the case of *Patrick v. Montader*, 13 Cal. 434; but in doing so, he evidently overlooks the essential elements of that case. There, the debt was held to be equitably due, and the decision was placed expressly upon that ground. It was admitted that "an attachment is at least *prima facie* void as against another attachment, where the first is issued before the maturity of the debt." But as the debt in that case was equitably due, the court would not interfere to deprive the creditor of his advantage. His suit had been improperly brought, but he was entitled to the benefit of the equities in his favor. This is all that was decided; and in what particular the two cases can be regarded as analogous we are unable to perceive. In this case, the debt was not due either legally or equitably, and the pretensions of the plaintiff are based upon the bald proposition that the validity of the attachment cannot be impeached

upon that ground. This proposition is not supported by any of the authorities, and we are aware of no principle upon which it could be maintained. Drake, in his work on attachment, section 773, lays down the doctrine broadly, that "where an attachment appears to have issued on a debt not due, it will be set aside in favor of a junior attachment upon a debt that was due." In *Pierce v. Jackson*, 6 Mass. 242, the court said: "If the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a creditor having a good cause of action." In *Swift v. Crocker*, 21 Pick. 241, the language of the court was equally emphatic; the question being whether the claim of the plaintiff was due and payable at the time of instituting the suit. "If not," said the court, "the subsequent attaching creditors will sustain their petition, and the attachment by the plaintiff must be dissolved." In *Smith v. Gettinger*, 3 Ga. 140, a similar question was presented, and the same conclusion arrived at; and in *Hale v. Chandler*, 3 Mich. 531, the court said: "It is established by a uniform course of decisions in this court that to entitle a party to commence a suit in attachment, he must have a present cause of action at the time he makes his affidavit and sues out his writ."

The controversy was between creditors, and an attachment issued before the maturity of the debt was set aside. We might refer to many additional authorities; but they proceed upon the same ground, and it is therefore unnecessary to do so. The universal language of the cases is, that an attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. In other words, an attachment so issued has always been regarded as a fraud upon the rights of such creditors. We accord to this doctrine our unqualified approval, and consider it decisive of the present case.

Our conclusion is, that the attachment of the plaintiff should be set aside in favor of the intervenors. So far as they are concerned, the judgment must be reversed, and the court below directed to administer the proper relief. There is no necessity for disturbing the proceedings as between the plaintiff and Eppinger.

Judgment reversed, and cause remanded.

FIELD, C. J., concurred.

PARTY TO BE ENTITLED TO ATTACHMENT MUST HAVE PRESENT SUBSISTING DEBT against the defendant: See *Henderson v. Thornton*, 75 Am. Dec. 70.

UNDER CALIFORNIA PROCEDURE, SUBSEQUENT ATTACHING CREDITOR MAY INTERVENE for the purpose of setting aside prior invalid attachments: *Speyer v. Imbels*, 21 Cal. 287, citing the principal case.

SUIT BROUGHT ON PROMISSORY NOTE ON DAY IT FALLS DUE IS PREMATURE, as the maker has all of that day in which to pay it: See *Wilcombe v. Dodge*, 58 Am. Dec. 411, and note; and see *Bell v. Sackett*, 38 Cal. 410, citing and affirming the principal case on this point.

SAN FRANCISCO v. LAWTON.

[18 CALIFORNIA, 465.]

OBJECT OF SUIT TO FORECLOSE MORTGAGE, UNDER CALIFORNIA LAW, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand for the security of which the mortgage was given.

ALL PERSONS ARE PROPER PARTIES TO SUIT TO FORECLOSE MORTGAGE who are beneficially interested, either in the estate mortgaged or the demand secured. This rule, generally, will only embrace the mortgagor and the mortgagee, and those who have acquired rights or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale.

IN SUIT TO FORECLOSE MORTGAGE, ADVERSE TITLES to the premises held by the parties claiming by conveyance from the mortgagor, prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination, but such titles must be settled in a different action.

FORECLOSURE OPERATES ONLY UPON ESTATE OR INTEREST WHICH MORTGAGOR POSSESSED at the date of the mortgage, and the sale under the decree passes only such interest or estate, except in the single instance where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which inures by way of estoppel to the benefit of the mortgagee, in which case the foreclosure operates upon the subsequently acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases, the estate mortgaged is the only estate brought under the consideration of the court, and the only estate affected by its decree.

VENDOR MAY DENY TITLE OF HIS VENDOR. Thus a party having a clear title may buy out settlers and trespassers, rather than incur the expense and delay of establishing their rights by litigation; and where, in such case, they are made parties to a suit to foreclose a mortgage executed by their grantor previously to the conveyance to them, they are not estopped from denying the title of the mortgagor, or from claiming that their rights under their previous titles are superior to those of the mortgagee.

QUITCLAIM DEED ONLY PURPORTS TO RELEASE AND QUITCLAIM WHATEVER INTEREST the grantor possesses at the time, and does not amount to the affirmance by him of the possession of any title, nor does it preclude him from subsequently acquiring a valid title, and attempting to enforce it.

GRANTEE, IN QUITCLAIM DEED, MAY DENY THAT HE RECEIVED ANY ESTATE by the deed.

GRANTOR OF LAND IN FEE MAY DENY THAT HE RECEIVED any estate by the conveyance. With the execution of the conveyance, the transaction between the parties is closed, and thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor, nor to maintain the validity of his title.

ACTION to foreclose mortgage. The opinion states the facts.

D. W. Perley and Volney E. Howard, for the appellants.

John McHenry, for the respondent.

By Court, FIELD, C. J. The object of the suit to foreclose a mortgage, under our law, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand for the security of which the mortgage was given. All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. This rule, as a general thing, will only embrace the mortgagor and mortgagee, and those who have acquired rights or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance: *Eagle Fire Co. v. Lent*, 6 Paige, 637; *Corning v. Smith*, 6 N. Y. 82; *Holcomb v. Holcomb*, 2 Barb. 23. The foreclosure operates, except in a single instance, only upon the estate or interest which the mortgagor possessed at the time, and the sale under the decree passes, with the like exception, only such estate or interest. The exceptional instance to which we refer arises where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which inures, by way of estoppel, to the benefit of the mortgagee. In such case, the foreclosure operates upon the subsequently acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases, the estate mortgaged is the only estate brought under the consideration of the court, and the only estate affected by its decree: *Clark v. Baker*, 14 Cal. 612 [76 Am. Dec. 449].

In the present case, the defendants, Howard, Perley, Gould, and Smith, who alone appeal from the decree, set up in their answer title to a portion of the mortgaged premises, under a grant from the former Mexican government, bearing date in May, 1839, and a patent of the United States, issued upon its confirmation, in March, 1858, and also under a deed executed by the tax collector of the city and county of San Francisco, upon a sale for unpaid taxes for state and county purposes, for the fiscal year ending in June, 1856. On the trial, they produced the patent, and traced title thereunder to the defendants Howard and Perley. They also produced the tax deed, and traced title thereunder to Perley.

The record does not disclose any evidence of title in either Gould or Smith under the patent or the tax deed. Of the value of the titles conferred by those instruments, it is unnecessary to express any opinion. Their validity is not the proper subject of determination in the present suit. It is only necessary to look into them so far as to see that they are asserted in good faith, and are not mere pretenses for delay; and this being seen, the rights of the defendants Howard and Perley, should have been reserved in the decree. If there were no other reasons than the assertion of these adverse titles for making them parties, the suit should have been dismissed as to them. But there were other reasons. Mowry, the mortgagor, subsequent to the mortgage, sold and conveyed all his right, title, and interest in the premises to Sawyer, and Sawyer quitclaimed a portion of the premises to Howard, Perley, and Thorne, and the balance to Perley alone. Thorne subsequently conveyed his interest to Gould and Smith. The appellants thus succeeded to whatever estate the mortgagor possessed, and as such successors were proper and necessary parties to the foreclosure: *Goodenow v. Ewer*, 16 Cal. 461 [76 Am. Dec. 540]; *Boggs v. Hargrave*, Id. 559 [76 Am. Dec. 561]. The estate thus acquired, whatever it may have been, was subject to foreclosure and sale under the decree of the court. This the appellants do not question; but Howard and Perley, who claim under the patent and tax deed, insist that they are not estopped by the acceptance of the quitclaim of Sawyer from denying that he ever possessed any estate—that is, title or interest in the premises—and from showing that the legal title derived from an independent and paramount source was in fact in them at the time; and in this position they are undoubtedly correct. The evidence of Sawyer shows that at the

time he executed the quitclaim, Howard, Perley, and Thorne claimed to hold an adverse title to the premises, and demanded possession; and threatened a suit in ejectment against him, and that with his conveyance he acknowledged their title. It is not material that such threat was made, or acknowledgment had, but they furnish an illustration of the good sense of the rule which permits a vendee to dispute the validity of the title of his vendor.

Parties possessing undoubted titles may often find it to their interest to buy out settlers and trespassers on their premises rather than incur the delay and expense of establishing their rights by litigation. It would be strange, if, under such circumstances, they should be estopped from denying the title of the grantors; and if a grantor had previously executed a mortgage upon the premises, that their rights under their previous titles should be subordinate to those of the mortgagee. The law does not even look that way. A quitclaim deed only purports to release and quitclaim whatever interest the grantor possesses at the time. He does not thereby affirm the possession of any title, and he is not precluded from subsequently acquiring a valid title and attempting to enforce it. If he does not possess any title, none passes; and he may subsequently deny that any passed without subjecting himself to any imputation of a want of good faith. So, too, a grantee in a quitclaim may deny that he received any estate by the conveyance: *Sparrow v. Kingman*, 1 N. Y. 242. More than this, a grantee in fee may deny that his grantor had any title. With the execution of the conveyance the transaction between the parties is closed. Thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor, nor to maintain the validity of his title. In *Osterhout v. Shoemaker*, 3 Hill (N. Y.), 518, Mr. Justice Bronson, in delivering the opinion of the supreme court of New York, said: "There is no estoppel where the occupant is not under an obligation, express or implied, that he will, at some time or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an entire stranger to the title." And in *Sparrow v. Kingman*, 1 N. Y. 253, Mr. Justice Wright, in delivering the opinion of

the court of appeals of the same state, observed that "there is no relation existing between the grantee in fee and his grantor as will raise even an implied obligation on the part of the former against a denial of the title and estate of the latter." See also, to the same effect, *Bright v. Rochester*, 7 Wheat. 548; *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 506; *Watkins v. Holman*, 16 Id. 54; *Barker v. Salmon*, 2 Met. 32; and *Averill v. Wilson*, 4 Barb. 180.

The case of *Clark v. Baker*, 14 Cal. 612 [76 Am. Dec. 449], is cited by the respondent as authority for the position that the appellants, claiming under the patent of the United States and the tax deed, are estopped from asserting their title against the title of the mortgagor. We do not understand the decision in that case as sustaining the position. The facts were these: Clark, without having the legal title, conveyed to Baker certain premises; Baker, to secure the purchase-money, mortgaged them back to Clark. The conveyance and mortgage were simultaneous acts, and both purported to be of the premises in fee. Subsequently, Baker purchased the outstanding legal title, and executed a second mortgage to Touchard. This last mortgage Touchard foreclosed without making Clark a party; and the purchaser at the sale under the decree claimed to hold adversely to Clark, and not in subordination to the first mortgage. The court held that the thirty-third section of the act concerning conveyances applied to mortgages equally as to conveyances absolute in their form; and that by its provisions, the mortgage of Baker, being of the premises in fee, operated upon the outstanding title, afterwards acquired, as effectually as if it had been originally possessed by him; in other words, that the subsequently acquired title inured to the benefit of the first mortgagee, and that the purchaser under the second mortgage took in subordination to him. And the court also held that the mortgagor was under obligation, from the nature of the mortgage contract, to preserve the property pledged for the purposes of the original security, and hence on grounds of public policy, and to insure good faith and fair dealing, was estopped, independent of any covenants of warranty, from denying the existence of the lien which he had attempted to create, or defeating its enforcement against the property upon which it was placed, and that parties claiming under the mortgagor were equally estopped; in other words, that the mortgagor could not, nor those claiming under him, set up to defeat the mortgage the title which he had subsequently acquired. There is nothing in that case which conflicts with the

views we have expressed in this opinion. Here, the mortgagor has acquired no outstanding title which inures to the benefit of the mortgagee, and the appellants Howard and Perley are not setting up any title derived from him to defeat the enforcement of the mortgage upon the property.

Whatever estate, if any, they have acquired from him, is as much subject to the mortgage as it was previous to his conveyance to Sawyer. So far as they claim under him, they are estopped equally with him from denying efficacy to the mortgage. But so far as they claim under other parties by an independent title, they are not bound by the mortgage. They can assert any rights which they may possess from that source against the mortgage, and the conveyance received from the mortgagor. Their rights in that respect should have been saved in the decree; and for the omission in that particular the decree must be reserved.

There are several other objections taken by the appellants to the action of the court below, but upon them we express no opinion. With a clause in the decree saving to the appellants their rights under the patent and tax deed, it is not probable that they will feel disposed to press the objections. On the further hearing, it will not be necessary to take anew the testimony. The parties can use that already embodied in the transcript, and add such further testimony as they may deem essential to the proper presentation of the case.

Judgment reversed, and cause remanded for further proceedings.

COPE, J., concurred.

EFFECT OF MORTGAGES AND PURPOSE AND EFFECT OF FORECLOSURE SUITS IN CALIFORNIA: See *Goodenow v. Ever*, 76 Am. Dec. 540; *Boggs v. Hargrass*, Id. 561, and notes.

UNDER LAW OF CALIFORNIA OR WHERE MORTGAGOR WARRANTS TITLE, subsequently acquired title inures to the benefit of his mortgagee, as much as if that title had been originally possessed by the mortgagor: *Clark v. Baker*, 76 Am. Dec. 449, and note; and see the principal case cited to this effect in *Vallejo L. Ass'n v. Viera*, 48 Cal. 579; *Bostwick v. McEvoy*, 62 Id. 502; *Pan-coust v. Travelers Ins. Co.*, 79 Ind. 176, 177; *Marrier v. Lee*, 2 Utah, 462.

QUITCLAIM DEED DOES NOT PASS AFTER-ACQUIRED TITLE: See note to *Frink v. Darst*, 58 Am. Dec. 586, 587; and see the principal case cited to this effect in *McDonald v. Edmonds*, 44 Cal. 330; and *Grattan v. Wiggins*, 23 Id. 39.

PERSONS NOT MADE PARTIES TO FORECLOSURE PROCEEDING are not affected in their rights thereby: See *Odell v. Wilson*, 63 Cal. 160; *Elias v. Verdugo*, 27 Cal. 423, citing the principal case.

ADVERSE TITLES CANNOT BE LITIGATED in a proceeding to foreclose a mortgage: *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 680; *Banning v. Bradford*, 21 Minn. 31; S. C., 18 Am. Rep. 400, citing the principal case.

SHELDON v. STEAMSHIP UNCLE SAM.

[18 CALIFORNIA, 527.]

HUSBAND AND WIFE CANNOT RECOVER JOINTLY IN ACTION BY THEM EX CONTRACTU for the breach of a contract made, during the wife's coverture, with a steamship, for the transportation of the wife from San Francisco to New York. But if, in such action, no demurrer be interposed, and if the facts stated and proved show that plaintiffs are entitled to relief for fraud practiced by defendant, or for personal injury to the wife, then the action to that extent is well brought, and relief will not be denied on the ground that the same facts would support an action on the contract, in which the husband alone can recover.

HUSBAND AND WIFE MUST JOIN IN ACTION FOR INJURY done to the person of the latter; and it is immaterial that the injury is charged to have been committed in violation of a contract.

PARTY MAY SUE IN TORT INSTEAD OF UPON CONTRACT, where the breach of the contract constitutes a wrong.

IN ACTION BY HUSBAND AND WIFE AGAINST STEAMSHIP for injuries inflicted upon the wife, brought under section 317 of the California practice act, plaintiffs cannot recover disbursements or expenditures by the husband. For these, he must sue alone.

LIABILITY OF STEAMSHIP IN ACTION under section 317 of the California practice act is measured by that of the owners, and extends to the entire injury sustained.

PRACTICE IN COURTS OF ADMIRALTY HAS NO APPLICATION to actions brought under section 317 of the California practice act by husband and wife against steamship for injury inflicted on the wife.

ACTION for malperformance of contract for transportation of passengers. The opinion states the facts.

Whitman and Wells, for the appellants.

Delos Lake, for the respondent.

By Court, COPE, J. This is an action brought under the provisions of the three hundred and seventeenth section of the practice act, to recover damages for the malperformance of a contract, made with the Accessory Transit Company of Nicaragua, to convey Catherine Sheldon, wife of James Sheldon, from San Francisco to New York by what was known as the Nicaragua route. This company were the owners of a number of steamships engaged as common carriers in the transportation of persons and property, for hire, between those points, and the contract provided for the conveyance of Mrs. Sheldon from San Francisco to San Juan del Sur, in Nicaragua, and thence by the usual route to her destination at New York. The defendant was one of the steamships belonging to and employed for these purposes by the company, and was designated in the contract as the vessel to be used in the

voyage from San Francisco to San Juan del Sur. The contract was made in April, 1856, and a short time previous thereto the company were in possession, and had the exclusive control under a charter from the government of Nicaragua, of the transit across the isthmus upon that route. When the contract was entered into, however, this charter had been annulled, and the company and their agents were fully advised of that fact, and knew that the contract could not be carried out. With this knowledge in their possession, they had published in the newspapers a notice upon the subject, the object and effect of which were to mislead the public; and it is averred, and the jury expressly find, that the plaintiffs were deceived thereby into making the contract. The facts were not communicated until after the departure of the defendant from San Francisco, and the company were so situated that the passengers were compelled to submit to the imposition which had been practiced upon them. It was then announced that the defendant, instead of stopping at San Juan del Sur, would proceed to Panama, in New Granada, and the passengers were assured that upon crossing the isthmus to Aspinwall, they would be taken on board by a steamer and carried without delay to New York. When these assurances were given, no means of transportation beyond Aspinwall had been provided, and in giving them, the company must have been actuated by a deliberate purpose of deception. The complaint charges, and the jury find, that Mrs. Sheldon was taken to Panama without her consent, or that of her husband; that she was compelled to disembark in an open boat during a severe rain, and was transported to Aspinwall by railroad in a coal-car; that she was detained at Aspinwall seventeen days, during which period she was abandoned by the company, and left without protection or assistance; that the food and accommodations at Aspinwall were bad, and the climate unhealthy; that the acts complained of were committed in a spirit of recklessness, and from wanton and malicious motives.

The facts were found specially; but the jury, under the direction of the court, rendered a general verdict for the defendant. In support of this verdict, two grounds are relied on: 1. That the plaintiffs count upon the contract, and cannot therefore recover in a joint action; and 2. That the defendant is not liable under the statute.

We agree that the plaintiffs cannot recover jointly in an action *ex contractu* for a breach of the contract; but this does

not appear to us to be a sufficient answer to a recovery in the present case. No demurrer having been interposed, the question is, whether upon the facts stated the plaintiffs are entitled to any relief; for if they are, the action to that extent is well brought, and such relief cannot be denied upon the ground that the same facts are sufficient to support an action in which one of the plaintiffs only can recover. It is well settled that for an injury done to the person of a married woman she must join in the action; and it is immaterial that the injury is charged to have been committed in violation of a contract. If the act producing the injury be in itself tortious, it may be so treated for all remedial purposes; and it would be absurd to hold that because the wrong done amounts to the breach of a contract, it is therefore purged of its tortious character. "A promise and a tort," says Hilliard, "may be coincident, giving to the party injured by the breach of the promise a remedy as for a simple wrong, without reference to the accompanying contract as such. In other words, the breach of a contract may be a wrong, in respect of which the party injured may sue in tort, instead of suing upon the contract:" 1 Hilliard on Torts, 3. The cases in which this principle has been applied are very numerous, and the subject is so familiar to the profession that we do not propose to extend our examination of it beyond a reference to a few of these cases. In *Ives v. Carter*, 24 Conn. 392, the plaintiff had been induced by fraudulent representations to enter into a contract, which was subsequently broken. The question was, whether the plaintiff could sue in tort for the fraud, or was compelled to seek relief by an action upon the contract. The court said: "In a case thus situated, it appears to us that the party may have his election to sue either upon the contract or for the fraud; and in either case, so long as it appears that the party is entitled to the remedy he has selected, it can be no objection that he was also entitled to another remedy." In *Cary v. Hotailing*, 1 Hill, 311, it was held that a fraudulent vendee of goods might be charged in *assumpsit* for the price, or in trespass, at the pleasure of the vendor. In *Donnell v. Jones*, 13 Ala. 490 [48 Am. Dec. 59], an action in tort was maintained for the wrongful and malicious suing out of an attachment, although the plaintiff might have proceeded upon the attachment bond.

There is no doubt that the injuries inflicted upon Mrs. Sheldon are the proper subjects of an action. The treatment to which she was subjected upon her arrival at Panama, and the

fraud and imposition which have been practiced upon her, make out a gross and palpable wrong. For this wrong, the law entitles her to compensation in damages, and these damages can only be recovered in an action to which she is a party. The case in this respect must be determined by the rules of the common law, and if she were not a party, we should be compelled to hold that damages of this nature could not be recovered. We have but one form of action and but one set of rules to govern us in determining by and against whom the action is to be prosecuted; and in all cases where the statute is silent, the common law furnishes the rule of decision. "The husband and wife," says Chitty, "must join if the action be brought for the personal suffering of or injury to the wife;" and this is the settled rule of the common law upon that subject. The right of recovery does not extend, however, to any matter for which the husband should sue alone; and in the present case, the plaintiffs are not entitled to damages on account of disbursements or expenditures by the husband. The idea that the practice in this class of cases is to be assimilated to that prevailing in courts of admiralty has no foundation in the statute.

There is nothing in the point relating to the liability of the defendant. She was the efficient instrument in the violation of the contract, and it is impossible to measure her liability otherwise than by that of the company. She is undoubtedly liable to some extent, and any effort to limit that liability to anything short of the entire injury sustained will be found to be impracticable.

Judgment reversed, and cause remanded for a new trial.

FIELD, C. J., concurred.

IN ACTION FOR PERSONAL INJURIES TO WIFE, husband must be made party plaintiff: *Matthew v. Central Pacific R. R. Co.*, 63 Cal. 451, citing the principal case.

WRIGHT v. SOLOMON.

[19 CALIFORNIA, 64.]

FACTOR CANNOT PLEDGE AS SECURITY FOR HIS INDIVIDUAL DEBT GOODS OF HIS PRINCIPAL consigned to him for sale. This rule applies, not only to a technical factor whose only business is to sell goods consigned to him, but also to a factor who, at the same time, does business on his own account: *Hutchinson v. Bours*, 6 Cal. 385; *Glidden v. Lucas*, 7 Id. 26; and

Herr v. Barker, 11 Id. 393, limiting the rule to a technical factor, overruled.

POSSESSION OF PERSONAL PROPERTY IS ONLY PRIMA FACIE EVIDENCE OF OWNERSHIP, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. With this exception, the effect of possession as evidence of ownership is subordinate to the principles that no one can be divested of his property without his consent, and that no one can transfer a better title than he has himself.

CONSENT OF OWNER TO DISPOSITION OF HIS PROPERTY MAY BE INFERRED from acts as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority, according to the custom of trade and the general understanding of business men.

DELIVERY OF GOODS TO MERCHANT ENGAGED IN SALE OF SIMILAR ARTICLES is such evidence of the bestowal of the right to dispose of the same as to protect the purchaser from the possessor. But the authority to pledge cannot be inferred from possession in such case; for to pledge is a special transaction, outside of the usual course of business, and consequently outside of the protection extended to ordinary transactions of commerce.

ACTION for delivery of personal property. The plaintiff alleged that on or about the fourth of November, 1858, he was the owner and entitled to the possession of one hundred bales of gunny bags, of the value of four thousand dollars; that on that day they came into the possession of the defendant, who wrongfully detained them, to the plaintiff's damage in the sum of four thousand dollars. He prayed for possession, or the value in case a delivery could not be had. The answer set up two defenses: 1. Denying specifically all the allegations of the complaint; and 2. Justifying the taking under process, regular on its face, issued to the defendant as United States marshal for the northern district of California, out of the United States circuit court, in the suit of *E. E. Davison v. Isaac Swain*, in claim for the delivery of personal property—being the property in question—alleging service of the necessary papers on said Swain, the detention of the property by him for five days, and thereupon no claim having been made, his delivery thereof to the plaintiff therein. The case was tried by the court, which found the following facts: On or about the first of May, 1857, E. E. Davison, of Boston, consigned to William A. Darling, of San Francisco, the property in question, to be sold by said Darling on commission, for Davison's account. The property came to Darling's possession in September, 1857. On September 3, 1857, Darling placed the property on storage in his own name with Isaac Swain, a warehouseman in San Francisco,

and received a warehouse receipt therefor. On the thirty-first of December, 1857, Darling borrowed two thousand dollars from the plaintiff, for which he gave his note, and at the same time pledged said property as security therefor to the plaintiff, and indorsed and surrendered to the plaintiff the warehouse receipt by him then held; and the plaintiff on the same day surrendered said receipt to the warehouseman, Swain, and obtained from him a new receipt for said property in his own name. Darling's business was mostly a commission business, but he also bought and sold some goods on his own account. On the fourth of November, 1858, the defendant, as United States marshal, under process in the suit of *Davison v. Swain*, already mentioned, took said property from the possession of said Swain, and at the same time paid the storage due on it. Neither Swain nor the plaintiff in this action required, within five days, of the defendant the return of said property, according to section 104 of the civil practice act of the state of California, or otherwise; and thereupon, after five days had fully elapsed, the defendant delivered the property to said Davison. The court found as a conclusion of law that the plaintiff was entitled to a return of the property. The defendant appealed.

Eugene Casserly, for the appellant.

D. W. Perley, for the respondent.

By Court, FIELD, C. J. That a factor cannot pledge, as security for the payment of his individual debt, the goods of his principal consigned to him for sale, has been the established doctrine of the common law for more than a century. It was first declared in *Paterson v. Tash*, 2 Stra. 1178, as early as 1743, and has been uniformly adhered to ever since in the courts of England, except where it has been modified by acts of parliament. It is also the settled law in all our sister states of the Union, where the legislature has not interfered to make a change. In this state, without any legislative action on the subject, a limitation in the application of the doctrine to a special class of factors has been asserted by this court, which we shall hereafter particularly notice. The doctrine of the common law results from the fact that the factor is but an agent, and as such can only bind his principal when his acts are within the scope of his authority. A power to sell for the benefits of his principal, can in no way be stretched into a power to pledge for his own benefit. Nor does it make any difference whether the party taking the pledge was ignorant

as to the extent of the factor's authority, or that the factor was not the real owner of the property. "Whoever deals with an agent constituted for a special purpose," says Kent, "deals at his peril, when the agent passes the precise limits of his power:" 2 Kent's Com. 621. "The doctrine," says the same distinguished jurist, "that a factor cannot pledge is sustained so strictly that it is admitted that he cannot do it by indorsement and delivery of the bill of lading, any more than by delivery of the goods themselves. To pledge the goods of the principal is beyond the scope of the factor's power; and every attempt to do it, under color of a sale, is tortious and void. If the pawnee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover (say the cases) that the possessor held the goods as factor, and not as vendee; and he is bound to know, at his peril, the extent of the factor's power:" See *Daubigny v. Duval*, 5 T. R. 604; *McCombie v. Davies*, 6 East, 538; S. C., 7 Id. 5; *Pickering v. Busk*, 15 Id. 38; *Warner v. Martin*, 11 How. 224; *Buckley v. Packard*, 20 Johns. 421; *Stearns v. Wilson*, 3 Denio, 476; *Kinder v. Shaw*, 2 Mass. 398; *Hoffman v. Noble*, 6 Met. 74 [39 Am. Dec. 711]; *Holton v. Smith*, 7 N. H. 446; *Skinner v. Dodge*, 4 Hen. & M. 432; *Hewes v. Doddridge*, 1 Rob. (Va.) 143; *Benny v. Rhodes*, 18 Mo. 147 [59 Am. Dec. 293]; and *Benny v. Pegram*, Id. 191 [59 Am. Dec. 298].

The limitation in the application of the doctrine in this state, to which we have referred, was first distinctly asserted in *Hutchinson v. Bours*, 6 Cal. 385. It was there held that the doctrine is only applicable where the party pledging is "technically a factor," that is, "where his only business is to sell goods consigned to him for that purpose." In *Glidden v. Lucas*, 7 Id. 26, the same limitation is recognized, and in *Horr v. Barker*, 11 Id. 393 [70 Am. Dec. 791], it is directly affirmed. In none of these cases are any authorities cited by the court in support of the limitation. In the last case, Mr. Justice Burnett states that the harshness and injustice of the rule as originally established in England induced the court in *Hutchinson v. Bours*, 6 Id. 385, to confine the rule to a technical factor. But justices Ellenborough and Le Blanc, from whose observations in *Martini v. Coles*, 1 Mau. & Sel. 145, Mr. Justice Burnett concluded that they considered the rule a hard one, expressly held that the law was too firmly settled against the right of the factor to pledge to be disturbed by the court. "Perhaps," said Ellenborough, "it would have been as well if it had been

originally decided that where it was equivocal whether a person was authorized to act as principal or factor, a pledge made by such person free from any circumstances of fraud was valid. But it is idle now to speculate upon this subject, since a long series of cases has decided that a factor cannot pledge."

The case of *Martini v. Coles, supra*, was decided in 1813, and with "the long series of cases" which preceded and have since followed it, all recognizing and affirming the rule, it may be said with equal truth now as then, that it is "idle to speculate" as to any different rule which might have been originally established. Judges of great distinction have not hesitated to declare their approbation of the existing rule. Thus Mr. Chief Justice Abbott, in *Quiroz v. Trueman*, 3 Barn. & Cress. 349, expressed the opinion that "it is one of the greatest safeguards which the foreign merchant has in making consignments of goods to be sold" in England. And in the same case, Mr. Justice Bayley said that he could not help thinking that the rule had operated much to increase the foreign commerce of the kingdom, by holding out to consignors that if the factor went beyond the authority vested in him, it should not work a prejudice to his principal. "I entirely concur," continued the justice, "in saying that in my judgment this as a measure of policy ought not to be altered. The rule is founded upon a very plain reason; viz., that he who gives the credit should be vigilant in ascertaining whether the party pledging has or has not authority so to deal with the goods. That knowledge may always be obtained from the bill of lading and letters of advice."

Whatever doubts may have been expressed by different judges as to the expediency of the rule against the power of factors to pledge, there have been none as to the existence of the rule as we have stated it. It is as well settled as any rule of law can possibly be, and in no instance have we found any departure from it, except in cases cited from this court. The limitation sought in those cases to be ingrafted upon the doctrine—in other words, the distinction sought to be made between "a technical factor," that is, one whose "only business is to sell goods consigned to him for that purpose," and a factor who at the same time does business on his own account—is not recognized in any of the authorities in England or America, but is repudiated, either expressly or impliedly, in all of them, whenever the point arises. In *Martini v. Coles*, 1 Mau. & Sel. 145, which we have already referred to, the factor Vos was a general merchant, and as such had been in the habit of em-

ploying the defendants as brokers in the sale of West India produce. The plaintiff consigned to him a quantity of coffee for sale, and sent him a bill of lading for the same in the usual form, providing for the delivery of the coffee to him or his assigns, he or they paying freight. The factor indorsed the bill of lading, and delivered the goods to the defendants; and on the faith of these and other goods placed in their hands, they advanced various sums to him. And at the time, they had no knowledge that the factor was not the owner of the coffee. Trover having been brought for the coffee, the defendants urged that, as the factor was also a general merchant, and as such had usually employed them, and as the bill of lading was made out to himself, he might reasonably be mistaken for the owner of the goods. But the court, *per Le Blanc, J.*, said: "Whether it might not originally have better answered the purposes of commerce to have considered a person in the situation of Vos, having the apparent symbol of property, as the true owner in respect of that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate, since it has been established by a series of decisions that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor. Here Vos was clearly factor for the plaintiff; and the circumstance of the goods having been made deliverable by the bill of lading to Vos or his assigns cannot make any difference; since it conveyed to him no further authority over the goods than the party who consigned them intended to clothe him with."

In *Kinder v. Shaw*, 2 Mass. 398, the goods of the plaintiffs were placed for sale with one Carter, who kept a retail shop. To raise money, Carter pledged the goods, with other goods of his own property, to the defendants, who were ignorant of the plaintiffs' interest. Trover having been brought for the goods, the defendants argued that as Carter was not known to them as the factor of the plaintiffs, and as they had no ground to suspect the goods to be the property of the plaintiffs, or of any one else other than Carter, who kept an open shop in which these goods were exposed to sale with his own, they had a right to treat with him as the real owner. But the court gave judgment for the plaintiffs, Mr. Chief Justice Parsons observing, "that the court, considering the question of importance to the mercantile part of the community, had looked into the case with attention, and were all of opinion that a factor had no

authority to pawn goods which have been intrusted to him for sale. The rights of the principal and factor depend on the law merchant, which has been adapted by the common law. By this law, a factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him."

Numerous other cases to the same effect might be cited, where the factor was also engaged in business on his own account. In this state, there are few persons acting as factors who do not at the same time have some business of their own in buying and selling; and the practical effect of the decision in *Hutchinson v. Bours*, 6 Cal. 385, if sustained, would be to establish, as a general rule, that a factor may pledge without authority the goods of his principal for his own debt, and to make the very limited class of "technical factor" a mere exception to that rule.

The principle upon which the decision in *Hutchinson v. Bours*, *supra*, proceeds, as we infer from the facts of the case, is, that the possession of personal property by a person engaged in business on his own account is sufficient evidence of his ownership to protect parties dealing with him as the real owner. For this principle, there is no warrant in the law. Possession of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments, and whatever comes under the general denomination of currency. "The law is clearly laid down," says Le Blanc, J., in *Pickering v. Busk*, 15 East, 38, "that the mere possession of personal property does not convey a title to dispose of it, and which is equally clear, that the possession of a factor or broker does not authorize him to pledge." The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property of which a transfer is attempted, with the exceptions stated. The effect of possession as evidence of ownership is subordinate to these principles: *Covill v. Hill*, 4 Denio, 327. The consent of the owner to a disposition of his property may be inferred from acts, as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority according to the custom of trade and the general understanding of business men. Thus the delivery of goods to a merchant engaged in the sale of articles of a similar kind is such evidence of the bestowal of

the right to dispose of the same as to protect the purchaser from the possessor. The possession under such circumstances is evidence, not that the possessor is owner, but that he has received authority from the owner to sell. The authority to pledge would not be inferred from possession in such case; for to pledge is a special transaction, outside of the usual course of business, and consequently outside of the protection extended to ordinary transactions of commerce.

From the views expressed and the authorities cited, it follows that the limitation asserted in *Hutchinson v. Bours*, 6 Cal. 385, and *Horr v. Barker*, 11 Id. 393 [70 Am. Dec. 791], cannot be maintained. Those decisions are anomalous in their character, and in conflict with the law upon the authority of factors as it is recognized by the United States courts, and the courts of every state of the Union where the legislature has not interfered to make a change. We do not hesitate to overrule them; for it is of the highest importance to those engaged in commerce in this state that the decisions of this court on commercial questions should be in conformity with the adjudications on like questions of the courts of the principal commercial communities of the world.

The disposition of the question raised as to the authority of Darling to pledge the goods, for the recovery or value of which the present action is brought, renders it necessary to consider the other points made by the appellant. Upon the facts found, the judgment of the district court must be reversed, and that court directed to enter judgment for the defendant.

Ordered accordingly.

BALDWIN and COPE, JJ., concurred.

POWER OF FACTOR TO PLEDGE GOODS OF PRINCIPAL consigned to him to sell: See *Horr v. Barker*, 70 Am. Dec. 791, note 796, where other cases are collected; *Keighley v. Savage Mfg. Co.*, 71 Id. 600, note 607; *Agnew v. Johnson*, 62 Id. 303. A factor has no power to pledge property consigned to him for sale, as security for his own debt: *Hayes v. Campbell*, 55 Cal. 424, citing the principal case.

POSSESSION OF PERSONAL PROPERTY IS ONLY PRIMA FACIE EVIDENCE OF OWNERSHIP, and never prevails against the true owner except as to negotiable instruments and whatever comes under the general denomination of currency: *In re Sims & Co.*, 12 Nat. Bank. Reg. 320, citing the principal case. A second vendee is not entitled to stand in any better situation than his vendor in regard to the title to personal property other than negotiable instruments and whatever comes under the general denomination of currency: *Putnam v. Lamplier*, 36 Cal. 158, citing the principal case. One cannot generally transfer a better title than he himself has: *Agnew v. Johnson*, 62 Am. Dec. 303, note 307, where other cases are collected.

BICKERSTAFF v. DOUB.

[19 CALIFORNIA, 109.]

EXECUTION IS SUFFICIENT JUSTIFICATION TO SHERIFF FOR SEIZURE OF PROPERTY OF DEBTOR, whether it be in his actual possession or in the possession of an agent or parties holding it for his benefit.

WHERE STRANGER TO EXECUTION IS IN POSSESSION OF PROPERTY, CLAIMING IT AS HIS OWN by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce, not only the writ, but the judgment which authorizes its issuance.

SALE OF PROPERTY BY DEBTOR, EVEN IF VOID AS AGAINST CREDITORS, is good as between himself and his vendee, and all the world except his creditors. And such a sale cannot be attacked by a creditor merely because he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property.

REFLEVIN against a sheriff for an ox team and wagon seized under an execution upon a judgment against one Wormuth. The sheriff justified under the writ, claiming that the property, at the time of the levy, belonged to the defendant in the writ. On the trial, the defendant offered in evidence the execution and the return thereon, to which the plaintiffs objected, on the ground that the judgment should first be produced. The objection was overruled, and the execution and return were read to the jury. The defendant then introduced evidence tending to prove a contract for the sale of the property described in the complaint between said Wormuth and the plaintiff Turney and one Hunter, whereby Wormuth agreed to sell to Turney and Hunter the property, on being paid for it, and that, until paid for, it should remain the property of Wormuth; but that Turney and Hunter were to have the use of it in the mean time for the purpose of hauling wood to pay for it; that as fast as the wood was drawn, it should be delivered to Wormuth to be applied towards the payment of the property; that Hunter had sold his interest to the plaintiff Bickerstaff without the consent of Wormuth; that plaintiffs both claimed to be owners of the property, which had not been paid for; that a large part of the wood drawn had been used by Turney and Hunter for their own use, and that nothing had been paid for the property described in the complaint. The plaintiff introduced testimony tending to show that there was an absolute sale from Wormuth to Turney and Hunter. The court then offered to allow the defendant to introduce the judgment upon which execution issued, or if unable to produce it, to permit him to withdraw a

juror and continue the case on payment of costs. The defendant declined to accede to this offer, and the court thereupon instructed the jury to find for the plaintiffs, which they did. The defendant appealed.

John Reynolds, for the appellant.

Heydenfeldt, for the respondents.

By Court, FIELD, C. J. It is well settled that an execution is sufficient justification to the sheriff for the seizure of the property of the debtor, and it is immaterial whether the property be in the actual possession of the debtor, or in the possession of an agent or parties holding it for his benefit. But if the property be in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce, not only the writ, but the judgment which authorizes its issuance. A sale of property by a debtor, even if void as against creditors, is good as between himself and his vendee, and all the world except his creditors. And such sale cannot be attacked by a creditor merely from the fact that he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property: See *Thornburgh v. Hand*, 7 Cal. 554.

In the present case, the property was admitted to be in the possession of the plaintiffs, and they are strangers to the execution. The defendant did not produce the judgment, but attempted to attack the title of the plaintiffs by showing that, by the contract between the debtor and them, they were not to have the title to the oxen and wagon until the wood was drawn and delivered. The contract, admitting it to be as the defendant alleges, was a valid one in itself. The oxen and wagon were delivered to the plaintiffs as with them the plaintiffs were to draw the wood, the delivery of which was to constitute the consideration of the sale. The performance of the contract was entered upon by the plaintiffs, and until a neglect or refusal to complete the performance, the debtor could not have reclaimed the property, nor could the sheriff until then have seized it under process against the debtor. Unless the transfer were made to hinder, delay, or defraud creditors, the sheriff could not question its validity, and not even then with-

out first producing the judgment under which the execution he held was issued.

Judgment affirmed.

BALDWIN, J., concurred.

FRAUDULENT CONVEYANCE IS VOID ONLY AS AGAINST CREDITORS, but it is valid as between the parties thereto: *Smith v. Grim*, 67 Am. Dec. 400, note 401, where other cases are collected. Where a stranger to an execution is in possession of personal property, claiming it as his own by virtue of such a transfer to him from an execution debtor, as would prevent the latter himself from retaking possession, whether the transfer be by sale or pledge, the sheriff cannot justify a seizure of the property under the writ without producing both the writ and the judgment: *Knox v. Marshall*, 19 Cal. 622; *Kane v. Desmond*, 63 Id. 466, both citing the principal case.

GRIM v. NORRIS.

[19 CALIFORNIA, 140.]

COURT HAS NO POWER TO SEND ORDINARY ACTION AT LAW TO REFEREE for trial, against the objection of either party, whether the action requires the examination of a long account, or not.

CALIFORNIA STATUTE AUTHORIZING REFERENCE OF CASES is solely applicable to proceedings in equity. The right of trial by jury, in all common-law actions, is secured by the constitution of the state.

ACTION for work, labor, and services, and for money, paid, laid out, and expended. The complaint contained nine ordinary *assumpsit* counts. The cause was referred, by order of the court, to a referee, notwithstanding the objection of the defendant. The cause was heard by the referee, both parties appearing and introducing evidence. Judgment was entered, on the report of the referee, in favor of the plaintiff, for two thousand three hundred and thirty-five dollars. The defendant appealed.

Heydenfeldt and E. B. Crocker, for the appellant.

Winans, for the respondent.

By Court, COPE, J. This case was tried by a referee, and upon this report a judgment was entered for the plaintiff. The order of reference was made without and against the objection of the defendant. The action is an ordinary suit at law for the recovery of a debt, and in such cases the parties are entitled to a trial by jury, if they desire it. The ground of the reference was, that a trial of the case would require the

examination of a long account; and the court acted, no doubt, on the supposition that the statute afforded the requisite authority for the order. But the constitution provides that "the right of trial by jury shall be secured to all, and remain inviolate forever;" and if such a construction of the statute could be maintained, we do not see why this right might not be entirely swept away by legislative enactment. The framers of the constitution regarded the right of the citizen in this respect as too sacred and valuable to be intrusted to the guardianship of the legislature, and the provision referred to was intended as a restriction upon legislative authority. We have repeatedly held, however, that this provision of the constitution did not extend to equity causes, but was limited in its operation to those cases in which the right of trial by jury previously existed. An intentional violation of the constitution on the part of the legislature is not to be presumed, and by construing the statute as solely applicable to proceedings in equity, we avoid even a seeming conflict between the two instruments. We have no doubt that this construction is in accordance with the intention of the legislature; but whether it is or not, it is certain that no other effect can be given to the statute.

The point that the defendant subsequently waived his objection to the reference is not well taken.

Judgment reversed, and cause remanded for a new trial.

BALDWIN, J., concurred.

POWER TO SEND ACTIONS TO REFEREES.—Where both parties consent, all the authorities agree that a pending action may be sent to referees, and their report, when regularly made, is a proper foundation for a judgment. The practice of ordering such references, with the consent of the parties, particularly in actions requiring the examination of long accounts, was well known at common law: *Heckers v. Fowler*, 2 Wall. 123; *Newcomb v. Wood*, 97 U. S. 581; *Gopsill v. Hervey*, 34 N. J. L. 435. Said Mr. Justice Swayne, delivering the opinion of the supreme court of the United States, in the case of *Newcomb v. Wood*, 97 U. S. 583: "The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem*. In such an agreement, there is nothing contrary to law or public policy."

REFERENCE IN EQUITY CASES.—It is equally well settled that in all equity cases, the court may, even without the consent of the parties, order a reference. And where the case involves a long account, that is the proper and usual course: *Williams v. Benton*, 24 Cal. 424; *Jones v. Gardner*, 57 Id. 641; *Moss v. McCall*, 75 Ill. 190; *Patten v. Patten*, Id. 446; *State v. Orwig*, 25 Iowa, 280; *Teplitz v. Jackson*, 12 Gray, 565.

COMPULSORY REFERENCE OF ACTION AT LAW.—The power of a court to order a reference in an action at law, without the consent of both parties, is not derived from the common law. The power to order such a reference is wholly statutory: *Mead v. Walker*, 17 Wis. 189. The seventh amendment to the constitution of the United States, provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The courts of the United States are prohibited by this amendment from depriving the parties to an action at law of the right to have the issues of fact in such action tried by a jury. Those courts cannot, therefore, refer such issues to referees, without the consent of the parties: *United States v. Rathbone*, 2 Paine, 578. Mr. Justice Thompson, delivering the opinion in that case, said: "The convenience and utility of adopting this mode of trial by referees, where the controversy involves the examination of long accounts, have led me to look at the question with a wish to find the practice sanctioned by the constitution and laws of the United States, but I have not been able to find any ground upon which such authority can be sustained." This prohibition, however, extends only to such courts as sit under the authority of the United States, and does not apply to the state courts: *Lee v. Tillotson*, 24 Wend. 337; S. C., 35 Am. Dec. 624; *Livingston v. Mayor etc. of New York*, 8 Wend. 85; S. C., 22 Am. Dec. 622; *State v. Keyes*, 8 Vt. 57; S. C., 30 Am. Dec. 450.

The courts of several of the states hold that under the provisions of their respective constitutions guaranteeing the right of trial by jury, a compulsory reference of an action at law cannot be made, and that it is only in cases of a purely equitable nature that such a reference can be ordered: *Williams v. Benton*, 24 Cal. 424; *Hastings v. Cunningham*, 35 Id. 549; *Shaw v. Kent*, 11 Ind. 80; *McMartin v. Bingham*, 27 Iowa, 234; *St. Paul etc. R. R. Co. v. Gardner*, 19 Minn. 132; *Mills v. Miller*, 3 Neb. 87; *Lamaster v. Scofield*, 5 Id. 148; *Paulson v. Halsey*, 38 N. J. L. 492; *Beattie v. David*, 40 Id. 102; *Johnson v. Wallace*, 7 Ohio, pt. 2, p. 62; *Averill Coal and Oil Co. v. Verner*, 22 Ohio St. 372; *Plimpton v. Somerset*, 33 Vt. 283. Maxwell, J., in delivering the opinion of the court, in *Mills v. Miller*, 3 Neb. 94, said: "A purely legal action cannot be referred except by consent of parties, as neither party can be deprived of the right to a trial by a jury in such cases, and in actions involving an account between the parties, it is only in cases of a purely equitable nature that a reference can be ordered without consent of the parties." In *St. Paul etc. R. R. Co. v. Gardner*, 19 Minn. 132, a statute of Minnesota authorizing a compulsory reference in actions at law, where the trial of an issue of fact requires the examination of a long account on either side, was declared to be unconstitutional, being repugnant to the provision of the constitution of that state, that the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. In that case, it was said that the constitution of the United States was the supreme law of the territory at the time when the state constitution was adopted. So in *Plimpton v. Somerset*, 33 Vt. 283, it was held that an act giving a court power to refer actions suitable for trial by jury according to the course of the common law, impairs the right to trial by jury as guaranteed by the constitution of Vermont, and is therefore void.

In some of the states, the practice of referring actions at law involving the examination of long accounts has prevailed from a very early period. In New York, that practice came into use while the country was a Dutch colony.

After the grant of the charter of liberties and privileges in 1683, it was discontinued until 1768, when a statute was passed providing for the present modes of trial before referees. This act expired during the revolution, but was renewed in 1788, and has been continued down to the present time in substantially the same form. In other states, the practice was adopted while the state was under a territorial form of government, before its admission into the Union. In New York, the constitution provided that trial by jury should be retained in all cases in which it had been theretofore used. The courts of that state held that as references in cases involving long accounts were referable, without the consent of the parties, before the adoption of the constitution, they continued to be so after its adoption: *Lee v. Tillotson*, 24 Wend. 337; S. C., 35 Am. Dec. 624; *Van Marter v. Hotchkiss*, 1 Keyes, 585. The same conclusion has been reached by the courts of other states whose constitutions simply provide that the right of trial by jury shall remain inviolate. Thus in the case of *Tribou v. Stroubridge*, 7 Or. 158, Boise, J., delivering the opinion of the court, said: "This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. The courts of a number of states hold that compulsory references of actions at law may be ordered, and that statutes providing for such references in cases involving long accounts are not in conflict with their constitutions: *Huston v. Wadsworth*, 5 Col. 213; *Williams v. Elliott*, 17 Kan. 523; *Galbraith v. McCormick*, 23 Id. 706; *Edwardson v. Garnhart*, 56 Mo. 81; *Copp v. Henniker*, 55 N. H. 179; *Doyle v. Doyle*, 56 Id. 567; *Sargent v. Putnam*, 58 Id. 182; *Lee v. Tillotson*, 24 Wend. 337; S. C., 35 Am. Dec. 624; *Van Marter v. Hotchkiss*, 1 Keyes, 585; *Sands v. Tillinghast*, 24 How. Pr. 437; *State v. McKenzie*, 65 N. C. 102; *Leak v. Covington*, 87 Id. 501; *Tribou v. Stroubridge*, 7 Or. 156; *Mead v. Walker*, 17 Wis. 189; *Board of Supervisors v. Dunning*, 20 Id. 210; *Cairns v. O'Bleness*, 40 Id. 469; *Monitor Iron Works Co. v. Ketcham*, 47 Id. 177. Beck, J., delivering the opinion of the court in *Huston v. Wadsworth*, 5 Col. 216, said: "There is no constitutional impediment in the way of a liberal construction of the code remedy. Section 23 of the bill of rights secures the right of trial by jury in criminal cases, but imposes no restriction upon the legislature in respect to the trial of civil causes." And Doe, C. J., in delivering the opinion of the court in *Doyle v. Doyle*, 56 N. H. 567, said that the act of 1876 of that state "authorizes the court to commit to one or more referees any cause at law or equity, or the determination of any question of fact 'wherein the parties are not as matter of right entitled to a trial by jury.' 'As matter of right' here means as matter of constitutional right. And by the constitution neither party is entitled to a jury trial for the settlement of accounts too complicated to be intelligently investigated and adjusted in that way." And Vories, J., delivering the opinion of the court in *Edwardson v. Garnhart*, 56 Mo. 85, said: "It is contended that the constitution provides that the right of trial by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the question of fact involved therein tried by a jury; that if our statute providing for the reference of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending may, on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account on either side, etc. This statute has been in force in this state for at least thirty years, twenty years before the adoption of our present constitution. It is

not to be presumed that the provision of the constitution relied on was intended to change the law as it then existed and had been practiced on in this state for a quarter of a century; the object of the framers of the constitution must have been to preserve the right of trial by jury, as it then existed and had been practiced in the state, and not to establish a new rule of practice on that subject.

IN WHAT ACTIONS COMPULSORY REFERENCE MAY BE ORDERED.—An action for divorce may be referred: *Moore v. Moore*, 56 N. H. 512; *People v. McGinnis*, 1 Park. Cr. 387. When the return to an alternative writ of *mandamus* shows that the trial of the issue made will require the examination of a long account, a compulsory reference may be ordered: *People v. Wadsworth*, 61 How. Pr. 57. An action for the foreclosure of a mechanic's lien, where the issue involves the examination of a long account, may be referred: *Tooker v. Rinaldo*, 11 Hun, 154. But if either party to such an action demands that the issues of fact therein involved shall be tried by a jury, the court has no power to refer: *Druse v. Horter*, 57 Wis. 644. A referee may be appointed to admeasure dower and to assess the widow's damages by loss of rents and profits: *Brown v. Brown*, 31 How. Pr. 481. In a proceeding for contempt, the court has power to order a reference to take testimony for its information upon the subject of the contempt: *People v. Alexander*, 5 Thomp. & C. 297. The court may order a reference to ascertain the damages sustained by reason of an injunction issued without cause: *Russell v. Elliott*, 2 Cal. 245. In an action on a town treasurer's bond, a reference is proper where the issue appears to involve the examination of a long account: *Cairns v. O'Brien*, 40 Wis. 469. Where a contract between the parties has been established, and there remains thereunder a series of calculations which are necessary to the establishment of the rights of the parties, it is within the province of the court to order a compulsory reference: *Blair T. L. & L. Co. v. Walker*, 50 Iowa, 376. An action *ex contractu* to recover excessive payments for work, labor, and materials, made in the belief that false representations made and false certificates presented were true, may be referred, if the determination of the issues requires the examination of a long account: *People v. Peck*, 57 How. Pr. 315. An action by an attorney for services rendered, which requires the examination of a long account, may be referred: *Schmerhorn v. Wood*, 4 Daly, 158. A case involving the examination of a mass of vouchers and accounts and intricate mathematical calculations may be referred by the court of claims: *Lawrence v. United States*, 6 Ct. of Cl. 79. A reference may be ordered in an action upon a policy of marine insurance, where there are a great many hundred items of expenditure and loss involved, which seem to be items of general and particular average: *Ryan v. Atlantic M. I. Co.*, 50 How. Pr. 321. A case may be referred, although the only necessity for the examination of a long account would arise from the nature of an affirmative defense in the way of a counter-claim: *Blackstone National Bank of Boston v. Bogart*, 41 N. Y. Super. Ct. 292. But when an action for the breach of the covenants of a lease involves a long account, so as to be referable, it is not the less so because a counter-claim is set up in the answer: *Brooklyn etc. R. R. Co. v. Reid*, 21 Hun, 273. An action at law properly referable because of its involving the examination of a long account does not lose that character because an issue of fraud is tendered by the defendant's answer: *Welsh v. Darragh*, 52 N. Y. 590; *Devlin v. Mayor*, 54 How. Pr. 50; *Verplanck v. Kendall*, 45 N. Y. Super. Ct. 525. Where a complaint sets forth a claim composed of many different items, and the trial of the issues requires the examination of a long account, the fact that one item of the demand is

stated in the complaint in a separate count as a separate cause of action, and that, if sued on alone, it would not be referable, does not deprive the court of the power to refer: *Place v. Cheesbrough*, 63 N. Y. 315. In New York, the county court has power to refer causes in a proper case: *Coy v. Rowland*, 40 How. Pr. 385; *Hyland v. Loomis*, 48 Barb. 126.

WHEN ACTION IS READY FOR REFERENCE.—An action is not in a condition to be referred, until all the issues are raised: *Jansen v. Tappan*, 3 Cow. 34; *Dutcher v. Wilgus*, 2 How. Pr. 180; *Syme v. Bunting*, 86 N. C. 175. Nor should a reference be ordered before passing upon a defense set up, which, if sustained, may put an end to the controversy: *Commissioners of Wake v. City of Raleigh*, 88 Id. 120. And where the necessity of examining a long account depends upon the decision of an issue in the action, as to whether or not a partnership existed, a reference ought not to be ordered, until that issue has been first tried: *Graham v. Golding*, 7 How. Pr. 280.

ACTIONS WHICH CANNOT BE REFERRED.—An action of tort cannot be referred against the objection of either party: *Dederick's Adm'rs v. Richley*, 19 Wend. 106; *Warner v. Western T. Co.*, 3 Robt. 705; *Wickham v. Framee*, 13 Hun, 431. In an action brought to recover damages for personal injuries, where the defendant fails to appear at the trial, the court has no power to order a reference. The issues in such a case should be tried by the court, either with or without a jury: *Thompson v. Finn*, 9 Daly, 379. A compulsory reference cannot be ordered in an action brought to enforce a penal obligation, although a long account may be involved: *Hyatt v. Roach*, 52 How. Pr. 115. An action in which an issue of fraud is to be determined cannot be referred, without the consent of the parties. Issues of fraud must be tried by a jury, unless the parties consent: *Levy v. Brooklyn F. I. Co.*, 25 Wend. 687; *Wheeler v. Falconer*, 7 Robt. 45; *Freeman v. Atlantic M. I. Co.*, 13 Abb. Pr. 124. In an action for the specific performance of an agreement to convey land, the court has no power to order a reference to ascertain the damages for the breach of the agreement. The defendant has the right to have that question tried by a jury: *Stevenson v. Buxton*, 15 Id. 352. In order to justify a compulsory reference, it is absolutely necessary that it shall appear that the examination of a long account is required: *Keeler v. Poughkeepsie etc. Plank Road Co.*, 10 How. Pr. 11; *Sharp v. Mayor of New York*, 18 Id. 213; *Kennedy v. Shilton*, 9 Abb. Pr. 157; *Dickinson v. Mitchell*, 19 Id. 286; *Knips v. Stefan*, 50 Wis. 286. And the examination of a long account must be directly, not incidentally, involved: *Camp v. Ingersoll*, 86 N. Y. 433; *Cameron v. Freeman*, 18 How. Pr. 310; S. C., 10 Abb. Pr. 332; *Kain v. Delano*, 11 Abb. Pr., N. S., 29. The account, too, must be an account in the ordinary acceptation of that term. It is not sufficient that the examination of a large number of items, merely, is required: *Thomas v. Reab*, 6 Wend. 503; *Van Rensselaer v. Jewett*, 19 Id. 373; *McCullough v. Brodie*, 13 How. Pr. 346; *Hull v. Allen*, 66 Id. 124; *Brink v. Republic F. I. Co.*, 2 Thomp. & C. 550; *Felt v. Tiffany*, 11 Hun, 62; *Merritt v. Vigelinus*, 28 Id. 420. The examination of a long account does not mean an examination of it to ascertain the result or effect of it, but the proof by testimony of the correctness of the items composing it: *Magown v. Sinclair*, 5 Daly, 63. All the causes of action stated in a complaint must be referable, in order to make the action referable: *Evans v. Kalbfleisch*, 16 Abb. Pr., N. S., 13; *Flanders v. Odell*, Id. 247.

WATERMAN v. LAWRENCE.

[19 CALIFORNIA, 210.]

GUARDIAN AD LITEM APPOINTED TO REPRESENT INFANT IN SUIT FOR PARTITION has power to defend for the infant solely against the claim set up for partition of the common estate. The appointment of such guardian is a special power exercised by the court, and gives only a special and limited authority to the guardian, and his acts, so far as they transcend this authority, are void. The guardian has no power to admit away the rights of the infant, nor can the court give effect to any such admission as to a matter and for a purpose not within the scope of the appointment or the purview of the complaint in the suit.

PROCEEDING FOR PARTITION IS SPECIAL PROCEEDING WHOSE COURSE AND EFFECT ARE PRESCRIBED by the statute, and although, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach the judgment therein, yet, so far as the rights of an infant defendant are involved, the court has no jurisdiction except over the matter of partition, and has no power to render a decree divesting the infant's estate, not for the purpose of partition, but upon an adverse claim in the plaintiff, in a suit brought against such infant merely for partition.

BILL OF REVIEW LIES BY INFANT TO SET ASIDE DECREE rendered in a suit brought against him for partition of common estate, where the decree would be a cloud on or embarrassment to his title, and where the court had no jurisdiction to make such decree.

BILL to set aside a decree on the ground of errors of law appearing upon the face of it. The bill averred, among other things, that the decree in the partition suit referred to in the opinion was based entirely upon the admissions and confessions of the infants, made by their guardians *ad litem* in their answer therein, and that there was no evidence adduced. The order for a decree in that suit was in these words: "Let a decree be drawn in accordance with the confessions of the answer." The bill alleged that the proceedings before Leavenworth, alcalde, had been lost. The errors for which the decree in the partition suit are sought to be set aside are: 1. That Lawrence's title to the land claimed by him was denied in the answer, or at least not admitted, and that no proof was introduced to sustain the same; 2. That the attorneys who appeared for the infants had no power to disclaim their title; 3. That the action was for partition of land under the statute, and it does not appear from the proceedings that commissioners were appointed to make partition, and that the proceedings show that the statute was not complied with; 4. That it appears from the order of the judge that the decree was based on the confessions of the infant defendants, and without proofs; 5. That the decree is absolute and gives the infants no

day in court after they come of age to show cause against the decree; 6. That the court had no power to render a decree settling the title to the land, but was confined to the relief asked in the complaint. The defendants demurred to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action; and that the court has no jurisdiction over the subject-matter of the action. The demurrer was overruled, and the defendants failing to answer, final judgment was rendered setting aside the decree in question, and perpetually enjoining the defendants from asserting any right or claim to the property in controversy by reason of said decree. The defendants appealed.

B. S. Brooks, for the appellants.

Charles H. Parker, for the respondents.

By Court, BALDWIN, J. In 1855, Lawrence filed a complaint in the superior court of the city of San Francisco for a partition of certain real estate in that city. Lawrence claimed that, by certain mesne conveyances, he held an undivided interest in fifty-vara lot No. 75, which interest was held in common with certain heirs of one John Duncomb, some of whom were infants. To this complaint, the infant heirs filed their answer by John Evans and Margaret, his wife, the latter the widow of John Duncomb, and the mother of the defendants. Evans and wife had been appointed by the court their guardians *ad litem*. Their answer purports to be filed "by John Evans and Margaret Evans as guardians *ad litem*," etc. The answer denies that the plaintiff Lawrence had any common interest with them in the land, but avers that one Waterman holds a separate interest in a particular portion of the fifty-vara lot described in the proceedings; that his title came through certain proceedings had in 1849, before one Leavenworth, alcalde, exercising probate jurisdiction in San Francisco; and defendants aver ignorance of any title of Lawrence. A decree was rendered by the judge of the superior court, reciting that Lawrence was shown to be the owner "of the one-fourth part of the fifty-vara lot, No. 75," describing the portion particularly as in the answer; the decree also recites the other facts stated in the answer, as to the order of sale and proceedings under it, had before Leavenworth. The decree concludes as follows: "And therefore, it is considered that said Margaret Evans, John Evans, her husband, and Sarah Mary Duncomb, Mary Ann Duncomb, and Margaret Duncomb, defendants to this

suit, and all persons claiming under them, or either of them, the premises described above, be forever barred from all claim to any estate of inheritance or freehold in said premises. And it is further ordered that all other proceedings in this behalf be, and the same are, hereby discontinued."

This present proceeding is a bill filed by these infants (who are now married) to set aside this decree of the superior court, upon the ground of errors of law appearing upon the face of it.

1. It will be perceived that, though the complaint of Lawrence makes a case of partition, the answer denies this claim, but insists that if the plaintiff has any claim at all, it is a separate and independent claim to a particular lot mentioned, with which the heirs have no connection, and to which they have no right. The guardians were appointed to defend the infants against the claim as made in the complaint; they had no authority to give and gave no assent to a decree, not for partition or division of a common estate, but for a foreclosure of all claim of the infants, and the quieting against them of the plaintiff's title to the particular piece of land mentioned in the decree. The court might as well have entered a decree affecting their title, or declaring void their claim to any other property. The infants were not before the court for any such purpose, and the appointment of the guardian being a special power exercised by the court, and giving only special and limited authority to the guardians, it would seem that their acts, so far transcending this authority, would be void. The guardians did not, and had no power to, admit away the rights of the infants, nor the court to give effect to any such admission, as to a matter and for a purpose not within the scope of the appointment or the purview of the complaint. Its action in this respect would seem to be *coram non judice* and void.

It is contended by the appellant that the infants have no right to appear and review this proceeding, but that the decree is conclusive of their rights. It is enough to say that this proceeding for partition is a special proceeding, and that the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet so far, at least, as the rights of infants are involved, the court has no jurisdiction, except over the matter of partition, and has no power to render a decree divesting an infant's estate, not for the purpose of partition, but upon an adverse claim in the the plaintiffs—in a suit brought against the infant merely for

partition; for in this proceeding the court appoints a guardian to defend for the infant solely against the claim set up for a partition of a common estate. A decree might as well be made in such a suit for a sum of money on the confession of the guardian of such indebtedness. The only authority of the guardian to appear is by virtue of the appointment, and the appointment limits the effect of the appearance to the subject-matter of the suit in which the appearance is made. It is unnecessary to decide whether, under the statutes of this state, the infant, in an ordinary suit for partition in which the court has acquired jurisdiction of the subject and parties, has a right to appear and show cause, either before or after his arrival at age, against the decree, for we have no doubt that a bill like this would lie at the instance of an infant to set aside a decree, where the court had no jurisdiction, and where the decree would be a cloud on or embarrassment to the title.

The proceedings before Leavenworth, alcalde, are not set out. It is urged by the appellant that they are sufficient to vest title in the party claiming through them. The case of *Kegans v. Allcorn*, 9 Tex. 34, is a very strong one, to show that proceedings of the general character of those represented to have been taken before this officer, will be upheld whenever it is possible to uphold them in consistency with law. The concluding observations of the learned justice rendering the opinion in that case are marked by clearness and good sense. It would not be proper to pass upon this point definitely at this time, as the facts are not fully before us, and moreover, the full benefit of any defense arising from these proceedings before the alcalde can be had by the appellant in another form.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

WHERE DECREE IS GIVEN AGAINST INFANT, HE SHOULD BE ALLOWED DAY, on arriving at his majority, to show cause against such decree: *Lockwood v. Stradley*, 12 Am. Dec. 97.

MEEKER v. HARRIS.

[19 CALIFORNIA, 278.]

WHERE CREDITOR ATTACKS JUDGMENT BY CONFESSION AS BEING FRAUDULENT as to him on the ground that the object of the debtor and of the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to have the judgment enforced, he must plead this ground. A general averment in the complaint that the intent was

JUDGMENT BY CONFESSION, WHEN IMPRACHABLE: See *Owston v. Doby*, 73 Am. Dec. 96, note 99; *Bunn v. All*, 72 Id. 639, note 641, where other cases are collected; *Richards v. McMillan*, 65 Id. 521.

THE PRINCIPAL CASE IS DISTINGUISHED in *Hager v. Shindler*, 29 Cal. 99, and in *King v. Davis*, 34 Id. 106.

WEBSTER v. WADE.

[19 CALIFORNIA, 291.]

WHERE CONTRACT FOR SERVICE IS MADE FOR FIXED PERIOD, and the employer without good cause discharges the servant before its termination, he is still liable, and the servant may recover the stipulated wages.

ACTION for wages. The defendant agreed to employ the plaintiff's assignor as a steward on board a steamboat for the period of one year at the rate of one hundred dollars a month. Plaintiff's assignor worked for said defendant for a part of said period, and up to the sixteenth day of January, 1860, when the defendant laid up the boat under an agreement with other parties. There was a judgment for the plaintiff, and the defendant appealed. Other facts are stated in the opinion.

Love, for the appellant.

Burbank, for the respondent.

By Court, FIELD, C. J. The law is well settled, that where a contract for service is made for a fixed period, if the employer discharge the servant before its termination without good cause, he is still liable, and the servant may recover the stipulated wages. In the present case, the steamer upon which Collins was employed as steward was laid up by the defendant in pursuance of a contract made by him to that effect with other parties; but the defendant did not notify Collins that he should no longer employ him, and Collins continued at all times ready to perform the service required by the contract. The mere laying up of the steamer did not, of course, terminate the relation of the defendant as employer, or release him from his obligations to the steward. And even had he discharged the steward, his liability would have continued, there having been no good cause arising from the lat-

ter's conduct for the proceeding. There is no merit in the appeal, and the judgment is affirmed with ten per cent damages.

BALDWIN and COPE, JJ., concurred.

REMEDY OF EMPLOYER FOR WRONGFUL DISCHARGE before the end of his term of service: See *Ream v. Watkins*, 72 Am. Dec. 283, note 286, where other cases are collected.

GREGORY v. TABER.

[19 CALIFORNIA, 397.]

PETITION BY EXECUTOR FOR SALE OF REAL ESTATE OF DECEDENT must set forth the amount of the personal property of the estate, which has come to his hands, otherwise an order of sale made by the probate court and the sale made thereunder are void. The mere fact that an account of such personal estate is filed, at or about the date of filing the petition, or is found among the papers of the probate proceedings, is not sufficient, unless such account is referred to in the petition so as to form a part of it for the purpose of the reference.

TO SUSTAIN SALE OF DECEDENT'S REAL ESTATE UNDER ORDER OF PROBATE COURT, the petition for the sale must state the facts required by the one hundred and fifty-fifth section of the probate act. Unless the petition states those facts, the court does not acquire jurisdiction of the matter, and has no power to confirm the sale or to impart validity to it.

PROBATE COURT CAN CONFIRM THOSE SALES ONLY THAT ARE MADE UNDER ORDERS which it had jurisdiction to make.

EJECTMENT. The account of the personal estate, referred to in the opinion, was filed on the same day that the petition was filed, but whether at precisely the same time does not appear. It was on a separate piece of paper, and not annexed to the petition, nor referred to in it. When the plaintiff, in support of his title, offered in evidence a copy of the petition, the defendant objected, on the ground, among others, that it did not comply with the statute, and therefore gave the probate court no jurisdiction to order a sale. A nonsuit was granted on motion of the defendant, and the plaintiff appealed. Other facts appear from the opinion.

Thomas A. Brown, for the appellant.

John Curry, for the respondent.

By Court, BALDWIN, J. This case involves most of the facts and principles embraced in the case of *Gregory v. McPherson*, 18 Cal. 562. The action is ejectment, the plaintiff claiming

the tract of land sued for by virtue of an executor's sale of the property as that of the estate of Juana Sanchez de Pacheco. The defendant resisted the suit, upon the ground that the proceedings for the sale were fatally defective, and the sale void. The defects insisted on are, as in the case of *Gregory v. McPherson*, *supra*, mainly: 1. That two executors qualified upon Mrs. Pacheco's will, and that the proceedings were instituted and conducted by only one of them; 2. That the petition for the sale neither sets forth the amount of the personal property which had come to the hands of the executors, nor the condition or the value of the respective portions or lots of the real estate of which the testatrix died seised, nor the ages of the heirs or devisees.

It is said that this case differs from that of *Gregory v. McPherson*, 13 Cal. 562, in this, that here, an account of the personal estate, fulfilling the requirements of the statute, was proved to have been filed at or about the date of filing the petition. But the answer is, that no such account was filed with or as a part of the petition. The mere fact that an account was filed, or was found among the papers of the probate proceedings, is not sufficient. It must have been referred to in the petition, so as to become a part of it for the purpose of the reference. The statute is peremptory that the facts prescribed shall be stated in the petition. By a liberal construction of this requirement, we held, in *Stuart v. Allen*, 16 Cal. 473 [76 Am. Dec. 551], that if the petition referred to another paper on file, for the purpose of a more full and explicit statement of facts, that paper might be considered in connection with the petition, and both be taken together as a statement of all the required facts. But it is apparent that no such result could be attained unless the petition itself made the reference. The case of *Bloom v. Burdick*, 1 Hill (N. Y.), 185 [37 Am. Dec. 299], is not opposed to this conclusion. It seems that the New York statute of 1813 required the administrator "to accompany his petition with an account," etc. But our statute in this respect is different. It requires the petition to state particular facts as to the condition of the estate, and these are essential facts going to the jurisdiction. It is not sufficient that the administrator files a separate paper, not a part of or referred to in the petition, though this paper should state part of the facts which the statute requires the petition to state. If this were so, the consequence would be that a large number of

separate papers might be filed, each containing but a single averment, and it be contended that the whole, taken together, constituted a sufficient petition within the meaning of the statute. It is enough to say that, whatever the intention of filing this paper might be, it was not made a part of the petition, and that, as the parties interested are not presumed to have had knowledge of the filing of it, or any reason to suspect that it was filed, their notice or that of the court would not probably be drawn to it on the hearing of the petition; nor could its statements be answered, or in any wise drawn in issue. In no way did it become part of the proceedings in the case of application for the sale of the estate, and therefore cannot be considered as curing the defects, or supplying the place of the averments of the petition.

We have attentively considered the authorities and arguments on the question of probate sales, and have reluctantly reached the conclusion announced in the principal opinion in *Gregory v. McPherson*, 13 Cal. 562, that to maintain a sale of a decedent's real estate, under the order of the probate court, it is necessary that the petition should state the facts required by the one hundred and fifty-fifth section of the act.

It has been urged that the statute, in the one hundred and seventy-first and one hundred and seventy-second sections, in effect confirms these sales in cases where the report of the administrator is made, and the probate judge confirms the sale and orders a deed to be executed to the purchaser. But the answer is, that the sole authority and jurisdiction of the probate court come from the petition with the averments required in the one hundred and fifty-fifth section, and that, without this jurisdiction, the probate court has no power to confirm the sale or impart validity to it. If this be not so, it would follow that the whole estate might pass without any petition, or perhaps even any proceedings, except an order of sale and the order of confirmation. No such effect was designed to be given by the one hundred and seventy-first and one hundred and seventy-second sections, but they refer only to sales made under orders which the probate court had jurisdiction to make.

It is unnecessary to consider other points, or whether the statute of 1858 makes a different rule for cases of sales occurring after that act.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

PROBATE SALES OF REALTY IN CALIFORNIA, AND PETITION THEREFOR: See *Stuart v. Allen*, 76 Am. Dec. 551, note 561, where other cases are collected. The petition for sale of real estate must contain a description of the real estate as well as a statement of the personal property and outstanding debts of the estate: *Haynes v. Meeks*, 20 Cal. 314, citing the principal case. Such petition must furnish the court the materials for its judgment granting the order of sale: *Pryor v. Downey*, 50 Id. 398, also citing the principal case.

THE PRINCIPAL CASE IS CITED in *Townsend v. Tullant*, 33 Cal. 54, to the point that where there is no power in a court to render a judgment or to make an order, there can be none to confirm or execute it.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

STATE v. STEBBINS.

[29 CONNECTICUT, 482.]

INFORMATION MAY BE AMENDED, AFTER JURY IS IMPANELED AND SWORN, and the trial has commenced, by erasing the word "Norwalk" in the description of a railroad company and inserting in lieu thereof the word "New Haven," where the place on the railroad at which the crime was alleged to have been committed was more fully described in said information as being between Westport and Norwalk, particularly when the information contains other counts, quite sufficient to proceed with the trial upon, which had not been altered.

IN CONNECTICUT, ONE GOOD COUNT IS SUFFICIENT, upon a general verdict, either in a criminal or a civil case.

WHERE INFORMATION FAILS THROUGH VARIANCE, VERDICT OF ACQUITTAL DOES NOT BENEFIT DEFENDANT, for a new information may be filed immediately, avoiding the variance. It is therefore customary for our courts to allow the prosecutor to amend and go on with the trial without a re-examination of the witnesses, unless such re-examination is claimed by the prisoner.

TESTIMONY AS TO FACT WHICH IS IN ITSELF RELEVANT AND CONNECTED WITH ACCUSED by the testimony of an accomplice, is admissible as direct evidence, even though it might not be admissible for the purpose of corroborating the testimony of the accomplice.

NO RULE OF LAW ABSOLUTELY REQUIRES TESTIMONY OF ACCOMPLICE TO BE CORROBORATED, but the jury may, if satisfied thereby of the guilt of the accused, convict on such testimony alone.

TESTIMONY OF ACCOMPLICE IS OF SUSPICIOUS CHARACTER and calls for scrutiny on the part of the jury and for a particular caution to the jury on the part of the judge in his charge; and the neglect to give such a caution is a clear omission of judicial duty.

BOX FOUND IN POSSESSION OF PRISONER ACCUSED OF THEFT, and claimed to have a certain relation to the theft, which, on examining it before the

jury, is found to contain a secret place in the lid in which are certain bank bills supposed to be counterfeit, may be delivered to the jury as it is, and be by them taken to the jury-room.

INFORMATION for theft. The defendants were charged with having stolen an iron safe or chest belonging to an express company, from the railroad cars of the New York and New Haven Railroad Company, with a large quantity of bank bills and other valuable property contained in it. The information contained four counts, and in the third the place where the felony was committed was described as "between Westport and Norwalk, two of the stations of the New York and Norwalk Railroad Company." After the jury had been impaneled and sworn, and witnesses had been called and testified, the court, against the objection of the defendants, allowed the third count of the information to be amended by striking out the word "Norwalk" from the name of the company and inserting instead of it the word "New Haven." The state offered evidence to prove that there was in the stolen safe at the time of the theft, among other things, ten five-hundred-dollar bills of the Atlantic Bank of Boston. The prosecution offered as a witness one Kinney, an accomplice of the prisoners, who testified to the commission of the theft at the time and place alleged, and the participation therein of the prisoners. Kinney also testified to many other facts, among which are those stated in the opinion. The state then offered as a witness Charles H. Ward, teller of the Atlantic Bank, who testified as stated in the opinion. The prisoners denied that they went to the house of Stebbins, in Boston, as testified by Kinney. The state then offered as a witness Henry Sanford, who testified that he was in Stebbins's house in Boston about the first of November, 1860, and then saw in it the articles described by Kinney. This testimony was excepted to, but the court admitted it, and the prisoners excepted. The state also offered as a witness Charles E. Bosworth, a member of the firm of Bosworth & Co., flour dealers, who testified that the firm of which he was a member borrowed of Stebbins five hundred dollars in gold on the nineteenth of September, 1860, and gave him their note for it on that date. Kinney had testified that while at the house of Stebbins in Boston, Stebbins told him that he had loaned, or was to loan that day, five hundred dollars to a flour dealer in Boston. The box referred to in the opinion was a box found in Roberts's room when he was arrested. The attorney for the state claimed to have proved that it resembled exactly

the stolen safe, and that it was intended to be used in the perpetration of the theft. Upon the box being opened and exhibited to the jury, there was found a secret place in the lid in which there appeared to be bank bills apparently concealed, and which were apparently counterfeit. Upon objection being made by the prisoners, they were not exhibited to the jury, but remained in the place where they were found, and no comments were made upon them to the jury. After the charge to the jury, the box, against the objection of the prisoners, was delivered by order of the court to the jury, in the precise condition in which it was found at Roberts's house, and was offered in evidence and carried to the jury-room. The jury found all the defendants guilty, and they moved for a new trial.

Loomis and Sturges, in support of the motion.

Ferris, state attorney, and *Beardsley*, contra.

By Court, ELLSWORTH, J. The first ground upon which a new trial is claimed is that after the jury were impaneled and sworn, and the trial commenced, the information was amended by erasing the word "Norwalk" in the description of the railroad company, in the third count, and inserting in its place the word "New Haven."

We are not satisfied that this alteration was of any importance in itself. The former word was used only as a part of the description of the place where the offense was committed, and as the place was more fully described as being between Westport and Norwalk, we think it was sufficiently described, notwithstanding the error in this incidental part of the description. The substitution of the word "New Haven" for "Norwalk," in the mere description of the railroad upon which Westport and Norwalk were situated, was therefore of very little importance, and could not prejudice the defendants.

Besides, there were other counts quite sufficient to proceed with the trial upon, which have not been altered; and had the prisoners' counsel wished to test the sufficiency of those counts, they could have called for a verdict on them specifically. It is of no importance now, for one good count is sufficient, according to the English and our own law, upon a general verdict; and in this state, the law is the same in civil and criminal trials, though it is otherwise in England.

The great objection which has been pressed upon us for a new trial is, however, that no amendment of the information whatever could be allowed after the trial had begun, because,

in criminal cases, after the trial has once commenced, the prisoner has a right to insist upon a verdict from the jury, so that he may not be put in jeopardy a second time. The law is undoubtedly so, as a general rule; and so it was adjudged in the case of *United States v. Porter*, 3 Day, 283, in the circuit court of the United States at Hartford; but the rule is of no importance in a case situated as this is. A verdict of acquittal on this third count, even if it was the only one in the information, and contained a material variance in its statement of the crime intended to be prosecuted, would do the prisoner no good; for a new information could be filed immediately, avoiding the variance. It would be otherwise if the description was correct, and the prosecution was likely to fail because of the want of proof to sustain it. Then, of course, the prisoner could object to a *nolle prosequi*; for, if he could not, the attorney for the state could file a new information, and put the prisoner in jeopardy for the same offense as often as he pleased.

In any case, the court may, in the exercise of its discretion, grant delay, or a continuance of the cause. But when the prisoner has been put on trial for the real offense, and no good reason for delay or continuance appears, the prisoner is entitled to have the trial go on; for a verdict in his favor will be a bar to a future prosecution against him on the same matter. Practically, the objection of variance will avail the prisoner so little, that it is customary in our courts generally for the prosecutor to amend and go on with the trial without a re-examination of the witnesses, unless such re-examination is claimed by the prisoner, which was not the case here.

It is further objected that the testimony of Charles H. Ward, teller of the Atlantic Bank at Boston, should not have been received, on the ground that it was irrelevant, and because the witness did not identify the prisoner as the person who exchanged the bills at the bank.

These objections do not appear to us to have any great weight. The evidence conduced to establish certain facts claimed to be material, and was claimed to be corroborative of the testimony of Kinney, the accomplice, who had testified that Roberts and Stebbins were active with himself in planning and executing the felony for which they were on trial, and in appropriating the booty taken, including certain bills of the Alfred Bank; that he and Roberts went to Boston in September, where they met Stebbins at his house (describing

its appearance within), and had a conversation on the subject; and that Roberts, while there, went to the Atlantic Bank and got four fifty-dollar bills of the Alfred Bank changed for two hundred dollars in small bills; and that they then proceeded, with the two hundred dollars thus obtained and with nine of the ten five hundred dollars of the Atlantic Bank stolen, to Alfred, in the state of Maine, where the witness got them changed—not only the nine large bills, but the smaller ones also, which the prosecutor claimed were the avails in part of the other five-hundred-dollar note not found after the theft was committed in their hands.

All this testimony was deemed material to show the participation of Roberts in the crime committed, and if Kinney could testify to the facts, as he did, without objection, they could of course be testified to by Ward, so far as any part of them came within his knowledge. The exchange of the four fifty-dollar bills for two hundred dollars in smaller ones was a part of this testimony, and we think it is not to be rejected as wholly irrelevant. The evidence went to prove the complicity of Roberts in the felony, and particularly that he had in his hands the nine large bills which had been stolen, and the two hundred dollars in smaller ones, which he handed to Kinney at Alfred as the joint property of the three, and which two hundred dollars had been before obtained from the Atlantic Bank by some person. Ward testified that in September (as Kinney had said), a man came to his bank with four fifty-dollar bills and exchanged them for two hundred dollars in small bills, but he could not say that it was Roberts, whom he did not know; but Kinney swore that it was Roberts, for he accompanied him to the door of the bank for the purpose testified to by Ward. Taking the testimony together, it is unobjectionable in our view as testimony in chief to prove the guilt of Roberts.

But the chief purpose of the evidence of Ward was, we suppose, to corroborate Kinney; the rule of law being that an accomplice, to be entitled to full credit, ought, as far as possible, to be corroborated by further proof. Not that this is an unbending technical rule, or that an accomplice may not be credited in what he says without such further proof, for we entertain no doubt that without it a jury may be satisfied of the guilt of a prisoner, and that they may convict where they have not a reasonable doubt of his guilt, as this court held in the case of *State v. Wolcott*, 21 Conn. 272; but the whole ex-

tent of the rule is this, that such testimony is of a suspicious character, and calls for scrutiny on the part of the jury, and for a particular caution to the jury on the part of the judge in his charge. The evidence, if standing alone, is not to be rejected, and whether corroborated or not (and to what degree it needs corroboration the jury must judge), may be sufficient to satisfy the minds of the jury. So important, however, is it that the jury should be cautioned as to the weight of the evidence by the court, that to omit it is now held a clear omission of judicial duty, and becomes a ground, perhaps, for granting a new trial: *Roscoe's Crim. Ev.* 144; *1 Greenl. Ev.*, sec. 380; *Commonwealth v. Bosworth*, 22 Pick. 397. What the judge said to the jury in this case we do not know, but we may assume that he did his duty, as there is no complaint on this ground in the motion.

We do not understand that the English cases (which are rulings on the circuit), so earnestly pressed upon our consideration by the counsel for the defendants, contain any different doctrine from that which we have laid down. By reference to Taylor's late treatise on evidence, we shall find that the practice in England at the present time agrees with what we have stated to be our own. Indeed, Taylor makes use of the very language of Mr. Greenleaf on this point. "There is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement:" *1 Greenl. Ev.*, sec. 380. The cases, as we regard them, go only to the duty of the court in submitting such evidence to the jury, though some of the judges state what rule they, if acting as jurors, should think it proper to adopt.

The mere inability of Ward, the witness, to identify the prisoner with the man he dealt with at the counter of his bank, which was the precise objection taken to it by the defendants' counsel, was no ground for excluding his evidence entirely from the jury. Kinney supplied this lack of evidence, and he is an objectionable witness, though his credit was impaired by his avowed participation in the crime committed.

The same may be said of the testimony of Sanford and Bosworth. Their testimony was admissible, both as testimony in chief and as confirmatory of what Kinney had testified, and was rightly admitted. Nor do we see any error in the court ordering the box to be delivered to the jury.

We do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.

AMENDMENT OF INDICTMENT: See *McGuire v. State*, 72 Am. Dec. 124, note 125, where other cases are collected. In Connecticut, the complaint in a criminal prosecution may be amended after the evidence is closed: *State v. Prichard*, 35 Conn. 326, citing the principal case.

PRISONER MAY BE CONVICTED UPON UNCORROBORATED TESTIMONY OF ACCOMPLICE: *Commonwealth v. Price*, 71 Am. Dec. 668, note 671, where this subject is discussed at length; *State v. Williamson*, 42 Conn. 263; *Collins v. People*, 98 Ill. 500, both citing the principal case.

ATWATER v. HOUGH.

[29 CONNECTICUT, 508.]

ORAL CONTRACT BY ONE PERSON TO DELIVER TO ANOTHER ONE HUNDRED SEWING-MACHINES, at a time and place designated, upon condition that a part of them not then finished should be completed in season by a third person, who was making them for the former, he not being a manufacturer of machines himself, but having fitted up a shop for their manufacture, and contracted with such third party to occupy the shop and make the machines for him at a certain price each, he furnishing the shop-room, materials, and tools, is a contract for the sale, and not for the manufacture, of the machines, and therefore within the statute of frauds, where at the time of the making of the contract thirty-six of the machines were completed, and the remaining sixty-four were being manufactured in the shop, and the whole were to be boxed up and delivered together.

ENTIRE CONTRACT CANNOT BE WITHIN STATUTE OF FRAUDS AS TO PART of it and without the statute as to the residue. An entire contract for the sale of goods which is as to a part of the goods within the statute is wholly within the operation of the statute.

FACT THAT GOODS SOLD ARE TO BE BOXED AND TRANSPORTED to the place of delivery by the seller does not take the sale out of the operation of the statute of frauds.

ASSUMPSIT for breach of a contract to manufacture and deliver to the plaintiff one hundred sewing-machines. The facts are stated in the opinion. The jury found for the plaintiff, and the defendants moved for a new trial.

C. Chapman and D. R. Wright, in support of the motion.

T. C. Perkins and C. E. Perkins, contra.

By Court, **SANFORD, J.** In this case, the defendants requested the court to charge the jury that, if they found the facts as claimed by the defendants, the contract was within the statute of frauds and void, and therefore that their ver-

dict should be for the defendants. The court did not charge the jury as requested, and the question reserved for our advice is, whether upon the facts as claimed by the defendants and detailed in the motion, the agreement between these parties was or was not a contract for the sale of goods.

These facts are, that the defendants themselves were not manufacturers of sewing-machines, but they had fitted up a shop for the manufacture of them, and had contracted with Bell & Brooks to occupy the shop and make machines there, at a stipulated price for each machine, the defendants furnishing materials, shop-room, and tools. They had a contract with and were having machines made for other parties, and had thirty-six finished machines on hand, which the plaintiff agreed to take as part of the one hundred contracted for. Bell & Brooks had the materials for the rest of the hundred, and had them in the process of manufacture, and nothing was to be done for the plaintiffs by the defendants but to receive the balance of the machines from Bell & Brooks when finished by them, and to box and deliver the whole to the defendants. The obligation of the defendants was not an absolute but only a conditional one; they were only to furnish the machines to the plaintiff if Bell & Brooks should get them completed.

This was, in my judgment, an agreement for the purchase and sale of complete machines. It had indeed nothing to do with the manufacture of them, except as their completion by Bell & Brooks affected the defendant's obligation under the condition above mentioned. The manufacture of the machines had already been provided for by an independent contract made before, and without any reference to, this contract with the plaintiff. The machines were originally intended for, and were being made to supply an order from, another purchaser, and this contract with the plaintiff was to affect only their ultimate destination after they should be made and should have come to the hands of the defendants as their machines. The work remaining to be done upon the unfinished machines was not to be done upon the plaintiff's materials, or at his request, or for his use. The thirty-six machines were, and the sixty-four upon their completion would be, the property of the defendants, and the plaintiff would have no property in any of them until their delivery to him by the defendants. The defendants were to bestow none of their labor, skill, or care upon the machines, or to do anything whatever in the manufacture of them, and it was of no importance by whom they

were manufactured, or in what market they were procured. If they were in all particulars like the model, they would satisfy the contract.

The understanding and intention of the parties, as that is evinced by the stipulations which they have entered into and the language they have used, is always the rule by which contracts are to be interpreted and enforced. And it seems clear that this was substantially, and according to the intention and understanding of the parties, a contract for the purchase and sale of finished goods, and not for the making of them; for the transfer and acquisition of property in finished machines, and not for materials, and work and labor upon materials, in making them.

In the case of *Gardner v. Joy*, 9 Met. 177, Shaw, C. J.: "If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute; but if it is a contract to make and deliver an article or quantity of goods, it is not within the statute." In this case, the defendants, as they claimed, made no contract to make the machines; they only agreed to sell and deliver them, or, in the language of the motion, to furnish them if Bell & Brooks should get them completed: See also *Smith v. Surman*, 9 Barn. & Cress. 561; *Watts v. Friend*, 10 Id. 446; *Lamb v. Crafts*, 12 Met. 353.

This was indeed an executory contract, the machines were to be delivered at a future time, but notwithstanding the decisions of the courts in the earlier cases, it seems now to be settled, in accordance with the rules of just interpretation, as well as the dictates of reason and common sense, that a contract for the sale of goods is not without the purview of the statute merely because it is executory: *Rondeau v. Wyatt*, 2 H. Black. 67; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Downs v. Ros*, 23 Wend. 270; 2 Parsons on Contracts, 334, and note. Cases involving the question now under consideration have often arisen, and the distinctions made by judges in deciding them have in some instances been extremely nice, and it is not to be denied that it is difficult if not impossible to reconcile all those determinations. And perhaps, too, no general rule can be framed by which it may always be determined whether the agreement in question is a contract for the sale of goods, and so within the statute, or a contract for work and labor to be performed in a stipulated manner upon materials of which the goods are to be made, and so without the purview of the act.

But if we are wrong in regard to the sixty-four machines then in the process of manufacture, it seems impossible to entertain a doubt in respect to the thirty-six. They were entirely finished and ready for the market, and were examined by the plaintiff and agreed upon as a part of the hundred contracted for. As to them, it was an agreement to buy and sell them as they were. Nothing remained to be done to them to fit them for delivery, and nothing to be done with them except as accessory to the delivery upon the final completion of the contract.

The type-metal guides which Bell & Brooks were to apply to the machines if the plaintiff should furnish them in time were not regarded as, and were not in fact, any part of the machines contracted for. The machines were complete and ready for use without the guides. The defendants were neither to apply the guides, nor to be responsible for their application, and it made no difference in regard to the price of the machines whether the guides should be applied, or not. Indeed, the arrangement regarding them, whatever it was, was not made with the defendants, but with Bell & Brooks. The application of the guides seems to have been regarded as a trifling as well as voluntary service, which Bell & Brooks were willing to render for the plaintiff without compensation.

In regard to the boxing and delivery, that had nothing to do with the manufacture or completion of the goods sold. They were completed, and the broad rule relied upon by the plaintiff, that if anything remains to be done to the article sold to fit it for delivery the contract is not within the statute, whatever may be said of its accuracy, has no application in this case. And besides, the contract was entire, to sell the machines and to box and deliver them. And it being as to the sale of the machines within the statute and void, it was void also as to the boxing and delivery. For an entire contract cannot be within the statute as to part of it and without the statute as to the residue. It has often been decided that a contract to deliver the goods sold at a distance from the place of sale does not take the case out of the statute: *Astey v. Emery*, 4 Mau. & Sel. 262; *Bennett v. Hull*, 10 Johns. 364; *Jackson v. Covert*, 5 Wend. 139.

Lastly, this contract was entire, no part of it was separable from the rest; and if it were possible to consider it in relation to the sixty-four machines an agreement for work and labor in their manufacture, in regard to the thirty-six it was beyond all

controversy an agreement to buy and sell them as they were. As to them, therefore, the contract was within the operation of the statute, and was void. And then, the contract being entire, and being within the statute and void as to part of it, under the rule already alluded to, and to which we suppose there is no exception, it was wholly void: *Irvine v. Stone*, 6 Cush. 508; Cowen, J., in *Downes v. Ross*, 23 Wend. 270; *Thayer v. Rock*, 13 Id. 53; *Chater v. Beckett*, 7 T. R. 201; *Crawford v. Morrell*, 8 Johns. 253.

I think the court ought to have charged the jury as requested by the defendants, and therefore that a new trial ought to be advised.

In this opinion the other judges concurred.

New trial advised.

CONTRACT FOR DELIVERY OF GOODS IS CONTRACT OF SALE, and within the statute of frauds; otherwise, when the contract is for manufacture and delivery: See *Fickett v. Swift*, 66 Am. Dec. 214; *Bird v. Muhlinbrink*, 44 Id. 247, note 252, where other cases are collected; *Ide v. Stanton*, 40 Id. 698; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 504; *Cain v. Weston*, 26 Wis. 103, both citing the principal case. Where the contract is entire, and part of it is for the delivery of goods already manufactured, the whole contract must be regarded as within the statute: *Pickin v. Noyes*, 48 N. H. 300, also citing the principal case.

MONSON v. HAWLEY.

[30 CONNECTICUT, 51.]

ATTORNEY EMPLOYED UNDER GENERAL RETAINER TO COLLECT CLAIM BY SUIT has power to release lien of attachment on defendant's property on taking other security.

ATTORNEY OF PLAINTIFF, IN DIRECTING LEVY OF ATTACHMENT, is bound to consult the wishes and convenience of the debtor, so far as is consistent with his object in obtaining security for the claim.

BILL praying injunction against the sale on execution of bank stock levied on. In a suit by Hawley, the respondent, against Stevens and others, attachment had been levied upon fifty shares of the stock of the Norfolk Bank belonging to Stevens. Stevens, desiring to dispose of this stock, applied to Hawley's attorney to permit the substitution of other property for this stock. The attorney agreed to release the bank stock, and to receive in substitution shares of stock of a manufacturing company, known as the Empire Company, which shares

were at that time worth more than the bank stock. Stevens then delivered to the attorney a certificate for the stock, and a written stipulation that the officer's return might be amended by inserting the Empire stock instead of the bank stock as the property attached, and that he would take no advantage of any irregularity in the proceeding. They then went together to the Norfolk Bank, and the attorney there obtained from the cashier the copy of the attachment left with him by the officer, struck out from the officer's indorsement the bank stock described therein, and inserted instead thereof the Empire stock, and told the cashier that Stevens could now transfer his stock. The attorney acted in perfect good faith, though without consulting his client, the attachment plaintiff and present respondent. There was a balance due upon the bank stock, which Stevens paid up, and he then transferred the stock to different persons, who paid full consideration, and supposed that Stevens had an unincumbered title. The bank, with a like belief, issued certificates of stock to the purchasers. The respondent afterwards obtained judgment in the suit; but before this Stevens, who had been in good credit at the time of the arrangement for substitution, became insolvent, and the Empire stock had depreciated so as to be of little or no value. The co-defendants of Stevens were also insolvent. The respondent took out execution on his judgment, and caused it to be levied on the fifty shares of bank stock. The present bill is filed by the persons who purchased the stock from Stevens, and who seek to enjoin its sale on the execution. Upon these facts, the case was reserved for the advice of this court.

G. M. Woodruff and G. C. Woodruff, for the petitioners.

Hall, Goodwin, and Peck, for the respondent.

By Court, HINMAN, J. The plaintiffs are entitled to the relief prayed for, provided the defendant's attorney had power to release the lien acquired by the attachment on taking other security, as stated in the finding. This is admitted. The question, therefore, is as to the power of an attorney, who, under a general retainer, is employed to commence and prosecute to final judgment and execution, and to collect, a claim for damages arising on a breach of a contract for the delivery of property. The act of the attorney in this instance was done in perfect good faith, and at the time appeared to be for the benefit of the attaching creditor, as the property sub-

stituted for the stock first attached was at that time of more value than the stock itself. The plaintiffs also are in the condition of *bona fide* purchasers of the stock supposed to be released from the attachment, having paid a full consideration for its value at the time they purchased it, which embraced the installments, forty per cent, which had been paid in by Stevens after the release of the stock without notice of any outstanding lien or claim upon it. Under such circumstances, their equitable claim to the stock is very strong. Still, if the attorney had no legal power to release the attachment, perhaps the equitable claim of the defendant would be equally strong, and having a better legal right to the stock, he would be permitted to retain it. What, then, is the power of an attorney over property attached by him on a claim which he is employed to collect? Was the act of the attorney here fairly within the scope of his authority? He might in the first instance have attached the property which he attempted to substitute for that which he did attach, and if the defendant in that suit had requested it, it would have been his duty to do so, because his only object was to get security for the claim, and in doing this, he was bound to consult the wishes and convenience of the debtor so far as was consistent with his object. But if he had power to direct with regard to the attachment of property in the first instance, why should he not have the power of substitution at the request of the defendant? It has been held that he has power to waive a default in certain cases, even contrary to his client's instructions. He has power to direct the sheriff as to the manner of enforcing an execution. He may discontinue a suit, release bail, and in Maine it has been held that he may modify an attachment and discharge a lien created by it: *Anonymous*, 1 Wend. 108; *Williams v. Eldridge*, 1 Hill (N. Y.), 249; *Corning v. Southland*, 3 Id. 552; *Gaillard v. Smart*, 6 Cow. 385; *Gorham v. Gale*, 7 Id. 739; *Averill v. Williams*, 4 Denio, 295 [47 Am. Dec. 252]; *Jenney v. Delesdernier*, 20 Me. 183.

The result from these and other authorities which might be referred to seems to be, that the attorney by virtue of his general retainer has power over the means necessary to secure and collect a claim intrusted to him. And this is necessary for the security of third persons who act upon the faith of such authority. Perhaps no better illustration of the injustice to which such persons might be subjected can be given than that which is furnished by the facts found in this case. The

plaintiffs have all advanced their money for the purchase of property which, by the act of the attorney after the attachment, was made to appear free from any lien or claim upon it, and if the defendant could now hold it, they must lose it. If it be said that the defendant must lose to the same extent if the plaintiffs do not, the answer is, that it is more equitable that the loss should fall upon one whose agent has caused it than upon those who have been in no manner instrumental, either directly or indirectly, in producing it.

We advise the superior court to grant the relief prayed for.

In this opinion the other judge concurred.

ATTORNEY HAS AUTHORITY TO RELEASE PROPERTY ATTACHED: Note to *Clark v. Randall*, 76 Am. Dec. 265.

WELCH v. WADSWORTH.

[80 CONNECTICUT, 149.]

GENERAL RULES OF STATUTORY CONSTRUCTION MUST YIELD TO CLEAR INTENTION OF LEGISLATURE sufficiently expressed.

RETROSPECTIVE ACT CANNOT AFFECT CONTRACT MERGED IN JUDGMENT AT TIME OF ITS PASSAGE.

RETROSPECTIVE ACT MAY AFFECT CONTRACT UPON WHICH SUIT HAS BEEN BROUGHT and judgment by default rendered at the time of its passage, where the case is still pending on defendant's motion to be heard in damages, for the contract does not become merged in judgment until the extent of the defendant's liability under the contract is determined by final judgment.

JUDGMENT BY DEFAULT IS MERE ADMISSION OF CAUSE OF ACTION, leaving the rights of the parties to be determined upon defendant's motion to be heard in damages.

STATE LAW THAT MAKES VALID VOID CONTRACT DOES NOT IMPAIR OBLIGATION OF CONTRACT, within the meaning of the constitution of the United States.

ACT VALIDATING CONTRACT VOID AS USURIOUS DOES NOT IMPAIR OBLIGATION OF CONTRACT.

LEGISLATURE, IN PASSING RETROSPECTIVE LAWS, CANNOT DISREGARD those fundamental principles of the social compact which underlie all legislation irrespective of constitutional restraints; and if the act in question is in clear violation of them, it is the duty of the judiciary to hold it abortive and void. The rule is, that although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights, that the action of the legislature cannot be vindicated by any reasonable intendment or allowable presumption, it is the duty of the court to declare it void.

ACT VALIDATING USURIOUS LOAN OF SAVINGS AND BUILDING ASSOCIATION TO MEMBER THEREOF, though it injuriously affects an antecedent legal right of the borrower to insist upon the forfeiture by the lender of the whole interest, is not nevertheless, considering the nature of the right affected and the circumstances of the case, to be regarded as unjust or as an infringement of a vested right.

RIGHT OF BORROWER TO INSIST UPON FORFEITURE BY LENDER OF WHOLE INTEREST, though a legal right, is not to the full extent an equitable one. If the borrower goes into equity in respect to a usurious contract, he will be compelled to pay the principal and legal interest, because there is a moral obligation resting upon him to do so.

UPON REPEAL OF PENAL STATUTE, ALL PENALTIES FALL, EVEN IF GIVEN TO INDIVIDUALS, and though suit has been brought and is pending for them.

PARTIES TO USURIOUS CONTRACTS HOLD ANY RIGHT THEY MAY HAVE TO PENALTIES GIVEN BY LAW, subject to a modification or repeal by the legislature, and a consequent direct or indirect validation of the contracts.

ASSUMPSIT by Welch and Barbour as trustees in insolvency of the Hartford County Savings Association against the defendant as one of the makers of a promissory note for ten thousand dollars, with interest at the rate of eight per cent, payable semi-annually, and made to the Savings Association as payee. Various indorsements of interest paid had been made upon this note, amounting in all to about four thousand seven hundred and fifty dollars. At the time of the making of the note, and of suit brought thereon, the contract was under the law usurious, the legal rate being six per cent; and only the principal sum could be recovered without interest, and with a deduction from this amount of all the interest paid. The defendant permitted judgment by default, and the case was continued for a hearing in damages. Upon this hearing, the court found that when the note, which was given for a loan of ten thousand dollars by the association, was made, the defendant was a member of the association and one of its directors, and was such from the time of its organization to the time of its failure. Shortly before suit brought, it had gone into insolvency, and the plaintiffs had been appointed trustees of the estate. After the rendition of default judgment, but before the hearing in damages, the legislature passed an act validating the usurious contracts of the association, where made with its own members, to the full extent of the interest provided for by the contracts. Upon these facts, the question as to the amount of damages was reserved for the advice of this court.

Welch, for the plaintiffs.

Hubbard and Robinson, for the defendant.

By Court, BUTLER, J. It is apparent that if the contract on which this action was instituted is within the purview of the act of 1860, and the general assembly had power to pass that act, our decision must be controlled by it, and a consideration and determination of the other questions made in the case will be unnecessary.

The act was unquestionably retrospective. The only purpose expressed in or contemplated by it was to validate certain existing contracts between the plaintiffs' corporation and its debtors. That purpose, and the contracts intended, are stated in the most explicit terms, and the act must operate retrospectively, and upon them, if it operates at all. The contract in question is as clearly one of the class described in the act, and there is no opportunity to exclude it by construction. "All general rules of construction must yield to the clear intention of the legislature, sufficiently expressed;" and in this instance, the intention is clear and thus expressed; and we must hold this contract within the purview of the act. If indeed it was true that at the time of the passage of the act this contract had been merged in a judgment, and the respective rights of the parties judicially determined; if those rights had ceased to exist under the contract as such, and had attached under a judgment as such—we might well hold that the act did not embrace or affect them. But that position, as taken by the counsel for the defendant, cannot be sustained. The defendant had permitted a default to be entered against him. He had thereby admitted a cause of action; but he accompanied that admission by a motion to be heard in damages—to litigate further as to the character of that cause, and the extent of his liability under the contract, and that judgment be suspended until he could be heard. The parties are now here, on a finding of facts by the court upon a hearing on that motion, had since the passage of the act, and the judgment, which alone can merge the contract and change the rights of the parties, remains suspended awaiting our decision.

Under such circumstances, it cannot be said, with truth, that the point in dispute had been judicially determined, or the rights of the parties strengthened or impaired by this litigation.

But the question made in regard to the power of the general assembly to pass the act of 1860 is one of more importance, though not of serious difficulty.

It cannot be successfully claimed that it contravenes that

clause of the constitution of the United States which prohibits the enactment of a law impairing the obligation of contracts. There was no obligation resting upon the plaintiffs' corporation which it could impair. So far as their duty reached under the contract, it was performed. They had delivered their money to the defendant, and taken his promise to repay it, and the unperformed obligation was upon him. That obligation, so far as void, the legislature intended to validate. That such an act is not unconstitutional was settled by the supreme court of the United States in the case of *Satterlee v. Matthewson*, 2 Pet. 406. It was there holden that "a state law, which makes valid a void contract does not impair the obligation of a contract, within the meaning of the constitution of the United States."

Nor can it be claimed that the act in question conflicts with any provision of the constitution of this state. There is nothing in any of the provisions of that constitution which can restrain the legislature from passing retrospective laws; and it is their practice every year to do so, and not unfrequently acts which affect antecedent vested rights.

But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints; and if the act in question is a clear violation of them, it is our duty to hold it abortive and void.

In the case of *Goshen v. Stonington*, 4 Conn. 209 [10 Am. Dec. 121], this court had occasion to examine this subject; and a very clear and thorough review of it, in the light of principle and judicial determination, is contained in the opinion of the court, as given by Chief Justice Hosmer. That decision has since been followed by others, and the law is well settled in this court. The rule deducible from those decisions and others is, that although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights that the action of the legislature cannot be vindicated by any reasonable intentment or allowable presumption, it is our duty to declare it void.

Tested by this rule, the act in question must be sustained,

for although it undoubtedly affects injuriously the antecedent legal rights of the defendant under this contract, there is much of reasonable intendment and allowable presumption, derived from the nature of the right affected, and the circumstances under which the contract was made, to support the action of the legislature.

It may well be doubted whether the defendant has any antecedent rights of the nature of vested rights, created by this contract or existing under and by the terms of it, which the law can affect. His rights under and by the terms of the contract were, to receive and enjoy till demanded the money of the bank. Their rights were, to receive the interest as it fell due, and the principal sum on demand. The statute of usury operating upon it avoided the plaintiffs' right to demand the interest, and the legal obligation of the defendant to pay it, and gave him the privilege of insisting, at any subsequent time, that payments made as interest and received as such, in performance of the contract, should in any legal proceeding be considered as payments of principal, and applied in extinguishment of his obligation to pay that principal *pro tanto*. This privilege of refusing to pay interest, and of having payments made as such considered as payments of principal, not under and by virtue of the terms of the contract, or any presumable intention of the parties, different from that which appears upon its face (for we think it would be doing this defendant injustice to suppose he took this money originally with the deliberate intention of enjoying it without interest), but under and by virtue of a general penal law, is the only antecedent right of the defendant which the act in question can affect. That privilege or penalty the legislature unquestionably intended to take away by validating the contract in that respect. The right of the defendant originated in a statute founded upon policy, intended to protect the needy borrower from the presumed temptation of the lender to demand exorbitant interest for forbearance. It was stringent, and doubtless salutary when money bore a small proportion to the aggregate amount of other property or the wants of trade, but now in this commercial age, when the circulating medium bears so large a relative proportion, and money is often to be had for less than the legal rate, it is greatly modified and generally waived or disregarded, in cases of commercial exigency, by men of the highest character and integrity.

That right of the defendant to insist upon the forfeiture by

the plaintiffs of the whole interest, was a legal, but not to the full extent an equitable, one. Courts of equity do not view the statute as courts of law are compelled to do. If the borrower goes into equity in respect to a security given in connection with the usurious contract, or to avoid extortion or oppression, the court will compel him to pay the principal and legal interest, because there is a moral obligation resting on him to do so, and it is equitable that he should be compelled to do it. In the case of *Kilbourn v. Bradley*, 3 Day, 356 [8 Am. Dec. 237], this court said: "The statute against usury, on principles of public policy, renders void contracts upon usurious consideration. But the lender incurs no penalty, unless he actually takes usury; and courts of equity, on relieving against oppression or extortion, order the repayment of the sum really loaned or due, with lawful interest. The moral obligation of the borrower to pay the principal sum actually loaned, with the lawful interest, is unimpaired."

So far forth, then, as the legislature by the act in question interfered to compel this debtor to pay the principal of this debt and the lawful interest, they have merely provided for the enforcement of an equitable and moral obligation, and to that extent the defendant cannot complain that injustice has been done him. Have the legislature acted unjustly towards him in declaring that he shall fulfill his contract as to the excess of two per cent, which constitutes the usury? And does it clearly appear that there could have been no facts before them which authorized their presumed opinion that the act was just and reasonable? This is not an ordinary instance of usury. The case finds that the plaintiffs' corporation was organized in 1852, under the law of 1850, authorizing the establishment of savings and building associations, and that from the first organization down to the failure in 1858, he was a member and director of the company. Those associations, under the name of "bonus," were authorized to receive a greater sum than six per cent on loans to their members. The redeeming feature of the law was that which confined the right to take an excess of interest to loans made to the members only, by reason of which each member in theory might receive, from the excess paid by others, a compensation for the excess paid by himself. The law was construed generally to authorize a contract to pay future interest in excess of the legal rate, but this court, in the case of *Mechanics' Bank and Savings Association v. Wilcox*, 24 Conn. 147, held that those corporations were

confined, by a true construction of the law, to the taking of a bonus or excess of interest, at the time of the loan; and that construction avoided, so far forth, most of the contracts made by the numerous associations which had been formed under the act of 1850. In 1856, the legislature passed an act validating such contracts, but it was not broad enough to reach the class of contracts made by the plaintiffs' corporation. Is it not an "allowable presumption" that the legislature found, upon facts before them, that it was equitable to validate all those contracts, on the ground that they were made under a mistaken construction of the law, and that the connection of the defendant with this company, and the benefits he had received, made it entirely equitable that he should fulfill the contract according to its terms?

Again, the legislature may repeal a penal statute, and by the act of repeal, unless there be some saving clause, all penalties fall, even if given to individuals, and suit has been brought and is pending for them: *Butler v. Palmer*, 1 Hill (N. Y.), 324; *Smith's Commentaries on Statute and Constitutional Law*, 892-896. The parties to usurious contracts hold any right they can be presumed to hold to the penalties given by the law, subject to a modification or repeal by the legislature which may destroy them, and a consequent direct or indirect validation of their contracts. Is this act in substance and effect anything more than such a repeal as to the particular class of contracts upon which it operates? But further, in 1827 the banks of the state had generally adopted the practice of computing interest by Rowlet's tables, based on a computation of three hundred and sixty days for the year. This was a matter of convenience, not of intentional usury. But it gave the banks about eight cents excess of interest on every hundred dollars, and contracts amounting to millions of dollars existed which were usurious and void. The legislature passed a confirming act, and its validity was recognized by this court in the case of *Savings Bank v. Bates*, 8 Conn. 505. The act of 1827 was *ad idem* with the one in question, except that the usury taken in the contracts validated by the former was less, and that act was general—circumstances to be regarded doubtless in weighing the reasonableness and justice of the acts, but not constituting a difference in principle.

Again, the record discloses the fact that the plaintiffs are trustees in insolvency of the company with whom the contract was made, and by fair presumption, the fact that this money

is wanted to liquidate the just demands of creditors. Is it not an "allowable presumption" that the general assembly found that credits had been given the company upon the faith of this and other contracts, and under such circumstances as to the creditors of the company that, as between them and the defendants, justice required that the contract should be enforced?

Giving them due consideration to the nature of the defendant's right in relation to this contract, the history of our legislation respecting this class of corporations, the character of their loans, and the defendant's connection with the one in question, the presumed fact that this contract was made in good faith and on the supposition that it was legal and with the full purpose of performing it, and the presumption that the legislature found it beneficial to him and equitable that he should perform it, and also the fact that the money is required to satisfy the just demands of creditors, we cannot say that the act of 1860 is "clearly made to appear" to be an "infraction of a vested right which cannot be vindicated;" and we are of opinion that the plaintiffs are entitled to recover the principal sum loaned, and eight per cent interest, according to the tenor of the note.

In this opinion the other judges concurred.

JUDGMENT BY DEFAULT ESTABLISHES RIGHT OF RECOVERY, leaving amount of recovery in some cases to be ascertained by the jury: *Green v. Hamilton*, 77 Am. Dec. 295, and note. Such judgment admits every material allegation in the declaration: *Cook v. Skelton*, 71 Id. 250, note 252. The principal case is cited to the point that the default of the defendant admits the cause of action, the material and traversable averments, and that something is due the plaintiff, but leaves the amount open, to be determined by the proof: *Briggs v. Saeghan*, 45 Ind. 23.

PRINCIPAL AND LEGAL INTEREST MAY BE RECOVERED UPON USURIOUS CONTRACTS: *Philadelphia etc. R. R. Co. v. Lewis*, 75 Am. Dec. 574; *Baughner v. Nelson*, 52 Id. 694, and note 702.

LEGISLATIVE INTENT IN CONSTRUCTION OF STATUTES: See *Car Spring Co. v. Railroad Co.*, 69 Am. Dec. 181, and note collecting prior cases 184.

JUDICIARY CANNOT INQUIRE INTO WISDOM OR PROPRIETY OF LEGISLATIVE ACT: *Taylor v. Commissioners of Newberne*, 64 Am. Dec. 566, and note citing prior cases 573.

STATUTE VALIDATING USURIOUS CONTRACT TO EXTENT OF LEGAL INTEREST was held constitutional in *Baughner v. Nelson*, 52 Am. Dec. 694. The principal case is cited to the point that the defense of usury is not a vested right, which may not be taken away by a subsequent statute validating usurious contracts: *First Ecclesiastical Society v. Loomis*, 42 Conn. 576. Usurious contracts may be validated, and being once made valid, they remain so, and are

not affected by a repeal of the validating act: *Simpson v. Hall*, 47 Id. 422; *First Ecclesiastical Society v. Loomis*, 42 Id. 576, citing the principal case.

LEGISLATURE MAY PROVIDE REMEDY WHERE RIGHT EXISTS WITHOUT ONE: *Lycoming v. Union*, 53 Am. Dec. 575, and note; *Whipple v. Farrar*, 64 Id. 99.

RIGHT TO PENALTY GIVEN BY STATUTE DOES NOT BECOME VESTED until after judgment: *Oriental Bank v. Freeze*, 36 Am. Dec. 701. The principal case is cited to the point that a statute which authorizes a judgment for double damages is in the nature of a penal statute, and its repeal before judgment, though after verdict, will defeat the right to such double recovery: *Bay City etc. R. R. Co. v. Austin*, 21 Mich. 414.

COIT v. HAVEN.

[80 CONNECTICUT, 190.]

ASSIGNEE OF GARNISHED DEBT STANDS IN PLACE OF PRINCIPAL DEBTOR, and can make any defense to the judgment which he could make, and none which he could not make.

DOMESTIC JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION cannot be collaterally attacked, where no want of jurisdiction is apparent on the record, for in such case jurisdiction is conclusively presumed.

JUDGMENT MAY BE COLLATERALLY ATTACKED ON GROUND OF WANT OF JURISDICTION, if it be a foreign judgment or a judgment of a court of limited jurisdiction, or the want of jurisdiction is apparent on the record; for then the jurisdiction is either not presumed, or the presumption is repelled by the record itself; and the judgment is a nullity if the want of jurisdiction in fact exists.

JURISDICTIONAL FACTS, SUCH AS SERVICE OF WRIT, ARE CONCLUSIVELY PRESUMED in case of a judgment of a domestic court of general jurisdiction, unless the record itself shows the contrary.

REASON THAT JURISDICTIONAL FACTS ARE NOT CONCLUSIVELY PRESUMED IN CASE OF FOREIGN JUDGMENTS of courts of general jurisdiction is that one cannot reach a foreign judgment for the purpose of reversal without going to the foreign jurisdiction.

REMEDY OF ONE INJURIOUSLY AFFECTED BY RULE OF CONCLUSIVE PRESUMPTION OF JURISDICTIONAL FACTS is a writ of error for reversal, or a motion for a new trial, or, if the danger is imminent and special, he may obtain the aid of equity.

SCIRE FACIAS. The case comes up on a motion for a new trial. The opinion states the case.

Dutton and Bristol, in support of the motion.

Baldwin and W. C. Crump, contra.

By Court, **ELLSWORTH, J.** From this *scire facias* it appears that the plaintiffs recovered judgment against Calvin Durand of Milford, in this state, for the sum of three thousand and fifty-four dollars and forty-nine cents damages, and twenty-two dollars and forty-nine cents costs, in the

superior court holden in New Haven on the first Tuesday of September, 1849. The present defendants, Henry P. Haven, Charles Prentiss, and Thomas W. Perkins, were factorized in that suit as debtors of Durand. Judgment having been recovered, execution was taken out, and demand made upon the garnishees, but they refused payment, whereupon the present suit was brought to recover of them the amount of the judgment. The defendants filed a motion, informing the court that they had received notice from one Maxwell and one Hart that they were the owners of the debt by virtue of an assignment from Durand, and that the defendants must not make payment to any person but themselves, and prayed for an order under the statute for notice to be served on Maxwell and Hart to come in and assume the defense of the case, that the ownership of the debt might be settled among the claimants, so that they might safely pay the debt to the true owners, without further litigation; which order they obtained, and under it have cited in Maxwell and Hart, who have assumed the defense, and are making defense in the name of the garnishees. Of course the garnishees admit that they owe the debt to one of the parties, and are ready to pay as soon as the question of title is settled.

The plaintiffs, in making out their claim to the debt by their attachment of it under the original process, read in evidence the record of their judgment against Durand in the original factorizing suit. To avoid the effect of this judgment, the defendants offered to prove that at the time when the copy of the original writ was said to have been left with Durand in service at his place of abode in Milford, he was not an inhabitant of or resident in Milford, and had no usual place of abode in the state, but was an inhabitant of the state of New York, and domiciled in the city of New York. On objection made by the plaintiffs' counsel, the court excluded the evidence. The correctness of this ruling is the question presented for our consideration. Two questions obviously arise upon this inquiry: 1. Can the defendants themselves, either as garnishees or as assignees of the debt, take advantage of the fact which they set up? or is it one which belongs to Durand alone to take advantage of? and 2. Can it be set up either by him or by the defendants in this collateral manner, in opposition to the judgment which stands unreversed?

With regard to the first point, it is obvious that the invalidity of that judgment is of no importance to these defendants, in

their position as assignees of the debt, unless the plaintiffs' attachment is of an earlier date than their assignment. If the fact be not so, that is, if the debt was legally assigned to them before the plaintiffs attached it, the judgment is obviously of no avail against them, however valid it may be in itself. It could create no lien upon the debt except subject to their prior rights, or rather it could create no lien at all, since the debt would have wholly ceased to be the property of Durand and the attachment would take nothing. But if, as we have understood to be conceded, though the fact does not appear upon the record or upon the motion, the assignment of the debt to the defendants was after the attachment of it by the plaintiffs, then the defendants took the exact interest of Durand in the debt, neither more nor less, which was an interest subject to the lien of the plaintiffs' attachment, so far as that attachment, and the proceedings founded upon it, were regular and legal. Taking, therefore, the interest of Durand, they would stand precisely in his place, and could make any defense which he could make, and none which he could not make—taking it for granted that they did not take under any such stipulation as to the prior lien of the attachment that they would be bound by it. This brings us then to the second inquiry, What could Durand do himself? Could he attack the judgment collaterally, or must it, if avoided at all, be regularly reversed by some direct proceeding for that purpose.

This judgment was recovered before one of our own courts of general jurisdiction, and so is distinguishable from the judgment of a foreign court, or one of a limited and special jurisdiction. The question here turns upon this distinction.

We do not understand that, upon the authorities at home or abroad, there is any contrariety of opinion, that a domestic judgment rendered by a court of general jurisdiction, where no want of jurisdiction is apparent on the record, cannot be collaterally attacked. If it be a foreign judgment, or the judgment of a court of limited jurisdiction, or the want of jurisdiction is apparent on the record, it can be collaterally attacked; for then the jurisdiction is not presumed, or the presumption is repelled by the record itself, and the judgment is an absolute nullity if the want of jurisdiction in fact exists. This subject, with its various distinctions, was carefully considered and passed upon by this court, in the late cases of *Sears v. Terry*, 28 Conn. 273, and *Sanford v. Sanford*, 28 Id. 6; and in the less recent ones of *Pearce v. Olney*, 20 Id. 544;

Wood v. Watkinson, 17 Id. 500 [44 Am. Dec. 562]; and *Aldrich v. Kinney*, 4 Id. 380 [10 Am. Dec. 151]. We think this point is no longer open to dispute: See likewise 2 Am. Lead Cas., ed. 1857, 812; *Cook v. Darling*, 18 Pick. 393; *Granger v. Clark*, 22 Me. 128; and *Burgess v. Tweedy*, 16 Conn. 39.

If this rule of law be applicable to the present case, it is decisive of it; and we think it is directly applicable. The defendants' counsel insist that jurisdictional facts are never found absolutely and conclusively, by any court, whether its jurisdiction be general or special; and that, to this extent, any record may be attacked and disproved. We cannot yield to this claim. Jurisdictional facts, such as service of the writ and the like, are presumed, and conclusively presumed, in the case of a domestic court of general jurisdiction, unless the record itself shows the contrary, which the present does not; and we suppose the same would be true of a foreign judgment of the same character, were it not that a citizen here cannot by any process reach a foreign judgment to get it reversed, without going to the foreign jurisdiction where the judgment was rendered, which is never required of our own citizens or inhabitants.

Jurisdictional facts are conclusively presumed in courts of general jurisdiction, even when not found by the court. But in the present case, it is not necessary to rest upon that presumption, for the jurisdictional fact called in question by the defendants is found by the court. The superior court finds that the suit against Durand was regularly brought to that term of the court. The language of the record is: "This action came to the present term of this court;" which finding (and it is not merely formal) cannot be true, unless the writ was duly served on Durand. This is the usual record in such cases in courts of law; though a more direct finding of the fact of service is usually made in decrees in equity.

But the counsel for the defendants urge the extreme hardship to which a party may be subjected, if he may not deny and disprove the service of the writ, when he can clearly show that in fact no service was ever made on him, and that he never had notice of the suit in any form, and never heard of the judgment against him until it was made the ground of an action. They say, with great emphasis—and the argument is certainly a forcible one—can it be that a clerk of the court may fabricate a record, or an officer make a false return of service, and yet there be no escape for one who is thus by a

judgment in the suit made heavily indebted, or found guilty of a wrong, when in fact he is perfectly innocent, or never owed the debt, and could show it clearly if he had a chance? Will a court, they ask, because it has a general jurisdiction, protect and give effect to such a fraud?

It will not be denied, and has not been on the argument, that when a court has jurisdiction its record speaks absolute verity, because it is the record of the court's doings; and being a court of final jurisdiction, there must be an end to the matter in dispute, if it be possible to reach that end at all. And it is so necessary that confidence should be reposed in courts of a high character, as well as in the records of such courts, that on the whole, and in view of all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force, rather than to leave them open to be attacked in every way and on all occasions. Being domestic judgments, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose and reversed on error, or by a new trial, and if the danger is imminent and special, relief can be temporarily if not finally obtained by application to a court of equity. This was done in the case of *Pearce v. Olney*, 20 Conn. 544, above referred to. Any other rule with regard to judgments of such courts would be attended in its application with very great embarrassment, and would be very dangerous in its general operation. The general good clearly requires, and has therefore established the rule, that domestic judgments of courts of general jurisdiction cannot be attacked collaterally.

The reason why this rule is not extended to the judgments of all courts is, as we have before suggested, that the law conclusively presumes the jurisdictional facts in the case of a judgment of a court of general jurisdiction so long as the record shows nothing to the contrary, but does not make any such presumption in favor of the judgments of courts of limited jurisdiction. The jurisdiction of such courts, not being presumed, must depend upon actual facts, which of course are open to dispute, and not concluded by the record; for if the jurisdictional facts did not exist, the court really had no jurisdiction, and its record is not, in the eye of the law, an absolute verity, but a mere unauthorized narration.

These are the reasons in brief why the ruling of the superior court is in our judgment correct, and must be sustained. We therefore do not advise a new trial.

In this opinion HINMAN, C. J., concurred.

BUTLER, J., having tried the case in the court below, did not sit.

JURISDICTION, WHETHER MAY BE INQUIRED INTO IN ACTION ON JUDGMENT: See *Rape v. Heaton*, 76 Am. Dec. 269, and note collecting prior cases 280.

JUDGMENT OF COURT OF GENERAL JURISDICTION is conclusive, and not collaterally attackable, if the court had jurisdiction; but the question of jurisdiction of the subject-matter is an open one, and a want of such jurisdiction may be shown upon collateral attack: *Wallace v. Brown*, 76 Am. Dec. 421, note 428; *Reynolds v. Harris*, Id. 459, note 468. A judgment of court of general jurisdiction imports absolute verity, and its truth cannot be questioned, either by showing otherwise than by the record itself that the court had no jurisdiction, or that its jurisdiction was fraudulently procured: *Carpentier v. City of Oakland*, 30 Cal. 446, citing the principal case. Domestic judgments rendered by courts of general jurisdiction cannot be collaterally impeached, if no want of jurisdiction is apparent upon the face of the record: *Finnegan v. Leonard*, 7 Allen, 56; *Hahn v. Kelly*, 34 Cal. 403, 413, citing the principal case.

JUDGMENT IS PRIMA FACIE EVIDENCE OF JURISDICTION: *Horton v. Critchfield*, 65 Am. Dec. 701, note 704.

JUDGMENT CANNOT BE IMPEACHED COLLATERALLY BY SHOWING WANT OF SERVICE OF PROCESS: *Bridgeport Savings Bank v. Eldredge*, 73 Am. Dec. 638; and note 693. Due service of process upon the defendant is presumed, unless the contrary appears: *Hahn v. Kelly*, 34 Cal. 415; *Drake v. Duvonick*, 45 Id. 464, citing the principal case.

FOREIGN JUDGMENTS MAY BE ATTACKED BY INQUIRING INTO JURISDICTION OF COURT: *Horton v. Critchfield*, 65 Am. Dec. 701, and note 704; note to *Carpentier v. Pier*, 73 Id. 294. Jurisdiction will be presumed in case of a judgment of a sister state: *Reid v. Boyd*, Id. 61, and note 65.

JURISDICTION OF COURTS OF GENERAL JURISDICTION IS PRESUMED: *Reynolds v. Stansbury*, 55 Am. Dec. 459; *Kenney v. Greer*, 54 Id. 439, and notes. But there is no presumption as to the jurisdiction of courts of inferior jurisdiction; their jurisdiction must affirmatively appear: Id. The principal case is cited to this point in *Shepardson's Appeal*, 36 Conn. 25.

THE PRINCIPAL CASE IS CITED to the point that a judgment rendered in an action in which the property of the defendant has been attached, but in which no service was made on him personally, is not a judgment *in personam*, and cannot be made the basis of an action of debt. It can be effectual only as a judgment *in rem*, and may be enforced only to the extent of the property attached: *Masterly v. Goodwin*, 35 Conn. 278.

WELLS v. BRIDGEPORT HYDRAULIC COMPANY.

[30 CONNECTICUT, 316.]

EQUITY WILL RELIEVE AGAINST APPRAISEMENT OF LAND TAKEN UNDER CHARTER where the appraisers acted in the absence of the owner, and upon false information, and made an appraisement clearly wrong.

EQUITY WILL RELIEVE AGAINST APPRAISEMENT WHERE APPRAISERS WERE MISLED by false representations, whether the representations were fraudulently made or not.

WHERE PARTY INNOCENTLY MISREPRESENTS FACT BY MISTAKE, if it operates as a surprise and imposition upon the other party, the latter is entitled to relief.

ALLEGATION IN BILL THAT PETITIONER "IS INFORMED AND VERILY BELIEVES, and thereupon avers," is a direct and positive averment.

BILL IS NOT MULTIFARIOUS WHEN ALL ALLEGATIONS RELATE TO ONE AND SAME TRANSACTION between the same parties, to one and the same subject-matter, and to the same injury, though it prays for different modes of relief against that injury.

WHERE WRONG APPRAISEMENT OF DAMAGES FOR TAKING PROPERTY UNDER CHARTER IS MADE THROUGH APPRAISERS BEING MISLED, fraudulently or otherwise, upon a bill for relief the court will decree a new appraisement, and until such appraisement is made and the amount paid, will enjoin the respondent from using the former appraisement as a defense to the petitioner's action at law for his damages.

BILL in equity. The opinion states the facts, except that after the appraisement, the company diverted the water of the petitioner, and the petitioner sued the company at law for the damages caused him. During the pendency of that action, he filed this bill, praying that the appraisement be set aside and a new one ordered, and that the company be enjoined from using the proceedings as evidence in the trial at law or otherwise. Demurrer filed, and cause reserved for the advice of this court.

Loomis, for the petitioner.

Beardsley and Seeley, for the respondents.

By Court, **SANFORD, J.** By the finding of the superior court, it is shown that under the forms of law the petitioner's property has been taken and appropriated by the respondents to their own use, to the great injury of the petitioner, and without any substantial compensation being made for such injury.

The Bridgeport Hydraulic Company was incorporated for the purpose of supplying the city of Bridgeport with water; and by the terms of its charter, it was authorized to take and use the waters of any stream or streams, upon making compensation therefor, the charter containing the following pro-

vision with regard to the manner of determining the amount of the compensation: "In case any damage shall occur, or be likely to occur, to any person by means of taking his land or estate for the purposes of the act, or in the construction of the works of the company, and said person shall not have agreed with said company in writing for such damage, then said person may apply to the superior court for Fairfield county, or to any judge of the superior court who may by law judge between the parties, giving ordinary legal notice, or such notice as any judge of said court may prescribe to be given to the adverse party; and thereupon said court or judge shall appoint three judicious and disinterested persons to assess just damages to the parties concerned, after reasonable notice to them," etc. Under this provision in the respondents' charter, application was made to the superior court, an order of notice was obtained, assessors were appointed, the petitioner's damages were assessed, and all the proceedings in relation to such assessment were entirely completed, and the respondents appropriated the petitioner's property to their own use while the petitioner was absent in Europe, when he had in fact no actual residence in this state, and no agent here authorized to act in his behalf, and was entirely ignorant of the whole proceeding.

We deem it unnecessary to decide whether, under the order made by the superior court, notice to the person in occupation of the petitioner's property was a legal execution of that order, or was not, because we are satisfied that the finding of the superior court requires us to hold that, whether it was or not, the assessment ought to be held invalid. It was made, as the superior court finds, in the petitioner's absence, and when he had in fact no notice, or opportunity to be heard; while Richardson, the owner of more than half of the capital stock of the company, together with one attorney of the company, and another "attorney of certain other parties in interest," were present, and the committee were led to an opinion that the petitioner's mill had been abandoned, and that there would be no damage to him from the taking of the water by the respondents. By whom the committee were so led, or by what statements, representations, or appliances, the superior court does not find. But as it does not appear that any other than the three persons above mentioned were present with the committee, it is fair to presume that the committee were led by them or some of them. And as damages, amounting, accord-

ing to the finding of the superior court, to five thousand dollars, were assessed at one dollar, we cannot but see that whatever the motives of the parties leading, or the means made use of by them, the committee were in fact misled. The opinion to which they were led, and on which they founded their assessment, was utterly and grossly erroneous and unfounded. It is clear that the committee proceeded upon mistaken premises, upon erroneous information, and the conclusion to which they came was clearly wrong. It matters little whether the representations upon which they based their opinion and assessment were fraudulently made or not. It is enough that they were false, and that the committee were deceived and misled thereby.

Courts of equity relieve against accidents, errors, and mistakes, as well as frauds. And even where a party innocently misrepresents a fact by mistake, if it operates as a surprise and imposition upon the other party, the latter is entitled to relief. "These principles," says Mr. Justice Story, 1 Eq. Jur., sec. 193, "are so consonant to the dictates of natural justice that it requires no argument to enforce or support them." The case of *Carrington v. Holabird*, 17 Conn. 531, is analogous to the case before us. In that case, three suits were brought by Holabird against Carrington & Lee, upon promissory notes. The writs were duly returned; neither of the defendants appeared, but the plaintiff had the suits continued in court until the third term, when he took judgment by default. In the mean time, Carrington, supposing that those suits had gone into judgment, as they ought to have gone at the first or second term of the court, obtained his certificate of discharge under the bankrupt act of the United States, and after such discharge acquired property, upon which Holabird now levied his executions, and which he advertised for sale under the levy. Carrington then brought his petition for a new trial of the actions upon the notes, to enable him to plead his certificate in bar, and for an injunction against further proceedings, under the judgments so obtained; and this court held that the petitioner was entitled to the relief for which he prayed. Church, J., in giving the opinion of the court, said: "This jurisdiction will be exercised, when to enforce a judgment recovered is against conscience, and when the defendant had no opportunity to make defense, or was prevented by accident, or by the fraud or improper management of the opposite party, and without fault on his own part." And again:

"We have no reason to say that the plaintiff in those actions resorted to any means to continue them upon the docket. But the injury resulting to the present plaintiff, by reason of the unwarranted delay in the rendition of the judgments, is none the less real."

The principles applied in that case, we think, are applicable in the case now before us. The proceedings before the committee were of a conclusive character, and the law has provided no mode of obtaining relief against them, by petition for new trial, writ of error, or otherwise, in the courts of common-law jurisdiction. But in a case like this, in which manifest injustice has been done by the judgment of a tribunal before which the aggrieved party, without any fault of his own, has had no opportunity to be heard in vindication of his rights, it seems peculiarly proper for a court of equity to interpose and prevent the respondents from making use of the advantage thus unfairly obtained to defeat the plaintiff's action: 2 Story's Eq. Jur., sec. 885.

But several objections are taken to the bill. First, it is claimed to be insufficient, because it does not show that the respondents have not left in the stream water enough for the petitioner's use. But the bill does state that the respondents diverted the water of the brook from the premises of the petitioner, and that the damage thereby occasioned to the petitioner was not less than five thousand dollars, while the committee was led to assess those damages at one dollar; and in our judgment that is a sufficient statement of the petitioner's injury. Secondly, it is said that the petition does not show how notice of the respondents' application for an assessment could have been given to the petitioner. But, as we have already intimated, our opinion that the petitioner is entitled to relief is not founded upon the idea that the order of notice was not duly obtained or not duly executed, but upon the fact stated in the bill and found by the superior court, that the assessment of nominal damages only was owing to misrepresentations made to the committee, by which they were deceived and misled.

Next, it is contended that the bill is insufficient because the charge of misrepresentation is made as upon information and belief. The allegation is, that the petitioner "is informed and verily believes, and thereupon avers," etc. The charge therefore is made in terms of direct and positive averment. And not only is it in the form very commonly adopted in bills in

equity, but it is in no degree impaired by the statement that it is made upon information which the petitioner verily believes to be true. It is still a direct and positive averment.

Lastly, it is claimed that the bill is bad for multifariousness. "By multifariousness," says Mr. Justice Story, Eq. Pl., sec. 271, "is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them." We discover no such joinder in this bill. All the allegations relate to one and the same transaction between the same parties, to one and the same subject-matter, and to the same injury; and the petitioner prays relief only against a proceeding by which that injury is sought to be consummated.

Upon the whole, we think that a new assessment of the petitioner's damages ought to be made, by order, and under the direction and subject to the approval, of the superior court, and that in the mean time, and until such damages shall have been so assessed and paid by the respondents to the petitioner, the respondents ought to be enjoined from pleading, giving in evidence, or in any way using the former proceedings in the assessment of damages as a defense to the petitioner's action at law. And we so advise the superior court.

In this opinion the other judges concurred; except DUTTON, J., who having been counsel in the case did not sit.

EQUITABLE RELIEF, WHEN GRANTED ON GROUND OF MISREPRESENTATION OF MATERIAL FACT: *Smith v. Mariner*, 68 Am. Dec. 73, and cases cited in the note 88. This case holds that the misrepresentation must have been intentional. But in *Harrell v. Hill*, Id. 202, relief was granted though a misrepresentation as to quantity of land was innocently made by a vendor: See also *Miles v. Stevens*, 45 Id. 621; *Champlin v. Laytin*, 31 Id. 382. Equity will set aside awards for frauds, accident, or mistake: *South Carolina R. R. Co. v. Moore*, 73 Id. 778, and note 786.

OBJECTION OF MULTIFARIOUSNESS IS DISCOURAGED, where it would defeat instead of promote the ends of justice: *Marshall v. Means*, 56 Am. Dec. 444. No general rule exists in regard to multifariousness, but on the one hand multiplicity of actions is to be avoided, and on the other hand the blending in one suit of distinct and incongruous claims and liabilities: *Johnson v. Brown*, 87 Id. 556. A bill is not multifarious where the plaintiffs claim by a single, general, and entire right, although in opposition to the distinct and separate rights of several defendants: *Fann v. Hargett*, 32 Id. 680.

SALMON v. RICHARDSON.

[30 CONNECTICUT, 390.]

DIRECTORS OF INSURANCE COMPANY ARE LIABLE PERSONALLY TO ASSURED, who, by reason of the insolvency of the company, has been unable to recover upon his policy, where they have fraudulently made and published false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein; and it is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff.

DIRECTORS OF CORPORATION ARE POWER THAT GIVES EXPRESSION TO ITS WILL, but it is no part of their duty to perpetrate crimes or frauds in its name or for its benefit; and whatever the liability of the corporation may be, the individuals who under cover of their office of directors commit frauds are accountable for their conduct in a civil action at the suit of the injured party.

DIRECTORS OF CORPORATION ARE PERSONALLY LIABLE FOR FRAUDULENT REPRESENTATIONS whereby the plaintiff is induced to contract with the corporation. There is no privity of contract between the plaintiff and the defendants; but the action is not founded upon the contract, nor upon a breach thereof, but upon the tort.

FAMILIAR PRINCIPLES CONCERNING PERSONAL LIABILITY OF SERVANTS AND ORDINARY AGENTS for their positive torts must be applied to misfeasances of directors of corporations.

EVIDENCE IS RELEVANT AND ADMISSIBLE IN ACTION AGAINST DIRECTORS OF INSURANCE COMPANY for making false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein, and where one of the defendants denies all participation in the fraud, and all knowledge that bonds belonging to him were ever represented to be the property of the company, when the evidence tends to show that the president and another director had shortly before the publication of the false and fraudulent reports solicited such defendant to make an arrangement by which such bonds might be represented to be the property of the company, when offered in connection with other evidence tending to show that such an arrangement was consummated. So also a receipt given by such defendant to the company, and acknowledging that the bonds were the property of the company, and were held by him subject to its order, was admissible. And acts of such defendant, though done after the issuance of the policy to the plaintiff, are admissible, where they tend to show the defendant's knowledge of and participation in the fraud.

CASE against Richardson and others for an injury resulting to the plaintiff from the fraudulent representations of the defendants, as directors of the Bridgeport Insurance Company, concerning the assets and condition of the company, whereby he was induced to insure his property in the company. The plaintiff's insured premises were destroyed by fire, and through the insolvency of the company he was unable to collect the amount of his policy. Verdict was returned for the plaintiff, and the defendant Richardson moved for a new trial

for error in the rulings and charge of the court. He also made a motion in arrest of judgment, on the ground of the insufficiency of the declaration. These motions were reserved for the advice of this court. The opinion states the case.

Beardsley, in support of the motions.

Loomis and Hollister, contra.

By Court, SANFORD, J. It is unnecessary for us to examine all of the counts in this declaration, because we are satisfied that the fourth is sufficient, and upon that the plaintiff is entitled to judgment, whether the other counts are good, or not.

This count charges that the defendants were, and acted as, directors of the insurance company; "that for the purpose of giving the company a false and fictitious credit, and to increase the business of said company and to add to their own profits as stockholders of said company, the said directors, the defendants, did falsely and fraudulently represent and publish to the world, as and for the true condition of the affairs of said company, that said company was possessed of a very large amount of property of great value, to wit, forty-five Harlem railroad first-mortgage bonds," etc., amounting in all to three hundred and sixty-seven thousand one hundred and forty-seven dollars and twelve cents; "that the said directors of said company falsely and fraudulently represented said company to be the rightful owners of said property, and to be good and solvent, to induce people to effect their insurances in and by said company, and to increase the business and profits of said company, and their own profits as stockholders thereof; that the plaintiff, relying on said representations of the directors of said company, the said defendants, and believing the same to be true, at the special instance and request of the said company insured his building, etc., in said company, and paid to the company a premium on such insurance amounting to one hundred dollars; that the insured property was destroyed by fire; and that at the time of the publication caused and made by the directors as aforesaid, and at the time of said fire and for a long time previous thereto, said company was not the owner of the valuable assets before specified and enumerated, and contained in said publication, nor of any valuable assets, but was wholly insolvent; all which the defendants well knew when they thus willfully, falsely, and fraudulently uttered and caused to be published said false statement as aforesaid;" and

that by means of the premises, etc., the plaintiff has suffered great loss, etc.

The defendant Richardson claims that the publication complained of is charged to have been made by the defendants acting as directors of the insurance company, and that no action can be maintained against them for anything done by them while acting in that capacity.

We will not stop now to inquire whether, upon the true construction of this count, the false and fraudulent publication complained of is charged to have been made by the defendants when acting in their official or in their personal character, because we think that the law regarding the defendants' liability, in any aspect of it, is not as the defendants claim. If it is, it ought speedily to be amended in order to relieve it from just reproach.

Directors of a corporation, in the management of its affairs, are the power which gives expression to its will, but it is no part of their duty to perpetrate crimes or frauds in its name or for its benefit; and whatever the liability of the corporation may be, the individuals who under cover of their office of directors commit frauds like those charged against these defendants, ought to be, and in our judgment are, upon the clearest principles of law and justice, accountable for their conduct in a civil action at the suit of the injured party.

It is true that the contract of insurance was made with the corporation, and not with its directors, and that no suit could be maintained upon that contract against such directors, whatever agency they may have had in making it. It was the contract of the corporation, and not of its directors, and there was, therefore, as the defendants claim, no privity of contract between the plaintiff and these defendants. But this action is not founded upon any contract, or to obtain damages for the breach of one. The plaintiff's claim is that these defendants, availing themselves of the facilities afforded by their office and position of directors, have perpetrated a flagitious fraud upon him for the benefit of the corporation, and their own pecuniary profit and emolument as stockholders thereof; that they individually made and concurred in the making and publishing of the statement that the affairs of the company were in a sound and prosperous condition, knowing it to be false, and intending to deceive and defraud all property holders who might be induced thereby to insure their property in that company.

And whether directors of a corporation are to be regarded as its agents or its elements, impartial justice and public policy both require that as all natural persons are, so they should be, held responsible to third persons for the misfeasances by them in fact committed or commanded.

In the case of *Goodspeed v. East Haddam Bank*, 22 Conn. 530 [58 Am. Dec. 439], the contest between the parties was whether the corporation could be held responsible for the malicious and wrongful act of its directors. The bank was held responsible; but neither in that case nor in any other which has fallen under our notice has it been decided that the actual active perpetration of a wrong to the rights or property of another can find protection under the charter of a corporation, any more than in the command or authority of a natural superior. The familiar principles applicable in the case of positive torts committed by servants and ordinary agents must be applied to the misfeasances of directors also.

It may sometimes be difficult to prove the actual participation of individual directors in the acts complained of, but the legal principle which subjects them, when discovered, is not affected by such contingency.

No privity between the parties, other than that which is exhibited in this count, was necessary to the maintenance of the suit. The false and fraudulent statement of the condition of the insurance company is charged to have been made and published to the world by these defendants (knowing it to be false), to induce people to effect their insurances in and by said company. And it is averred that the plaintiff (being of course one of the persons to whom that false statement was addressed), giving credit to such false statement, insured his property in said company; and that by means of the false and fraudulent statement so uttered by the defendants to the world, and the plaintiff's belief in the same and consequent insurance in said company, he has suffered loss, etc. Thus the defendants' false and fraudulent publication is shown to have taken effect as they intended, in the deception and consequent loss and injury of the plaintiff, and to their own profit and advantage.

In the case of *Polhill v. Walter*, 3 Barn. & Adol. 114, where the defendant without authority had accepted a bill in the drawer's name as by procuration, Lord Tenterden, C. J., said: "Here the representation [of authority to accept] is made to all to whom it [the bill] may be offered in the course of

circulation, and is in fact intended to be made to all, and the plaintiff is one of these." And in *Gerhard v. Bates*, 20 Eng. L. & Eq. 129, where the declaration charged that the defendant, a director and managing agent of a joint-stock company, had published false statements of the condition and prospects of the company, knowing them to be false, to induce persons to purchase shares in the company, and by means of which the plaintiff had been induced to purchase, and had been injured and suffered loss thereby, Crompton, J., remarked that, although a contract required privity, he did not see that if one injured a mere stranger he might not sue for the injury. Coleridge, J., said: "It [the false statement] amounts to a representation to any person who may hold the shares." And Lord Campbell, C. J., in giving judgment, said: "We consider it clear law that if A fraudulently makes a representation which is false to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it and thereby suffers damage, B may maintain an action against A for the deceit, there being here the conjunction of wrong and loss, entitling the injured party to a compensation for damages." And in regard to the want of privity between the parties, he said: "The doctrine cannot apply to an action founded, irrespective of a contract, upon a false representation fraudulently made by the defendant to the plaintiff for the purpose of inducing the plaintiff to act upon it, the plaintiff showing that by so acting upon it he has suffered damage. Under such circumstances, although the parties be entire strangers to each other, the action lies, and it would be strange if a man who has suffered damage from the wrongful act of another were without remedy." In *Allen v. Curtis*, 26 Conn. 456, cited by the defendants' counsel, the complaint was that the defendants, being directors of a bank, had mismanaged its affairs, and rendered it insolvent and the plaintiff's stock therein worthless. This court held that the action could not be maintained, because the defendants, in the management of the affairs of the corporation, were its agents, and responsible to it alone for the manner in which they discharged their duties as such agents; and the property squandered was the property of the corporation, so that the plaintiff had no legal interest in the cause of action. And in *Denny v. Manhattan Co.*, 2 Denio, 115, the defendants, being transfer agents of the Planters' Bank of Tennessee, refused to make or permit a transfer to be made on the books of the Planters' Bank in their possession. The court held that

the plaintiff's remedy was against the Planters' Bank, not against its agent, upon the same principle that would subject an innkeeper and exonerate his servant for the refusal of the latter to receive and entertain a guest in his master's inn, or would subject a common carrier and exonerate his servant for the latter's refusal to carry goods in his master's wagon. In these cases, the legal obligation rests upon the superior, to whom alone the agent or servant is responsible for his fidelity, and the wrong complained of is, in the servant, a mere non-feasance, when the remedy of the injured party is always against the superior alone. In the case at bar, the defendants were guilty, not of a mere non-feasance toward the plaintiff or neglect of duty toward the insurance company, but were the active perpetrators of a positively wrongful act, intended to operate, and in fact operating, directly and injuriously upon the plaintiff's rights: See remarks of Jackson, J., in *Vose v. Grant*, 15 Mass. 519.

Two objections are taken to the ruling of the court below in admitting evidence.

First, it is claimed that the plaintiff's evidence to prove that the president of the company and another director, in November and December, 1857, solicited Richardson to make an arrangement by which certain valuable bonds might become or be represented to be the property of the company, was irrelevant and ought to have been rejected. We think it was properly admitted. Upon the trial, it was conceded that Richardson was a director of the company from its first organization until several months after the plaintiff's policy was issued in February, 1858, and that as early as the first day of July, 1857, six months before the publication of the false statements complained of, the company was and ever since had been utterly insolvent; that the bonds in question never were the property of the company, although by the published statement made on the first day of January, 1858, they were represented to be so; and Richardson testified that he did not know that the company ever claimed the bonds, or that the bonds were ever represented to be the property of the company. Certain entries in the books of the corporation also showed the purchase of these bonds by the company of Richardson, on the third of December, 1857, in exchange for certain worthless stocks of the Hudson Paint Manufacturing Company. But the plaintiff claimed that the exchange indicated by these entries was merely colorable, made under an

arrangement between Richardson and the other directors, in order that the bonds might, for fraudulent purposes, be represented to be the property of the company while they were not so in fact. And to prove such fraudulent arrangement, it was proper to show that just prior to the date of those entries such an arrangement was proposed to Richardson by the other directors, then the entries on the corporation books to which Richardson and all the other directors at all times had access, and then, that within a month after the date of those entries, Richardson acknowledged in writing that the bonds were the property of the company, and that he held them as such, and promised to return them on demand. Thus was presented a well-connected chain of facts and circumstances, from which the jury might fairly infer that the statement complained of was fraudulently made and published, with the knowledge, consent, and approbation of Richardson, as the plaintiff claimed.

It is to be observed that the proposition to Richardson was not to procure the bonds by a *bona fide* purchase or exchange only, but to make some arrangement by which the bonds might become, or be represented to be, the property of the company; and that the entries on the books showed not merely an exchange of these bonds, but an exchange of them for worthless stock, while the bonds were themselves of great value.

The very terms of the proposition indicate a fraudulent purpose in the party making it, especially when it is considered that the company was, and for nearly six months had been, insolvent, that the party making it, and the party to whom it was made, were all directors of the company and presumed to be cognizant of its condition, and that the time for making the annual statement of the company affairs was near at hand. The receipt is evidence that the proposition to make some arrangement had been accepted, while its peculiarity indicated the character of that arrangement.

The receipt, therefore, to the admission of which in evidence the second objection is made in this court, was properly admitted.

It is unnecessary for us to consider whether the evidence of Richardson's leaving his receipt with the company was admissible as against the other defendants or not, because it does not appear that the court was requested to restrict its operation to the case of Richardson alone, and as to him it was

undoubtedly admissible, both to prove his knowledge of and participation in the fraudulent statement, and to contradict his own testimony that he was ignorant, and therefore innocent, of the fraud. And besides, none of the defendants except Richardson now claim that the evidence was admissible. He alone files this motion.

Lastly, we think the defendants' objection to the charge ought not to prevail. It is certainly true that evidence of false statements, representations, or other acts, after the plaintiff's insurance was effected, and having no reference to what had transpired before, should have been laid out of the case, because such subsequent acts could have had no influence upon the plaintiff when he effected that insurance; and so the judge told the jury. But it is equally true that the conduct and declarations of the defendant after the insurance may have been such as to indicate the existence of a combination between Richardson and the other defendants, prior to the insurance, to perpetrate the fraud complained of. And we think that Richardson's delivery of the bonds to Green, in order that they might be exhibited to the New York commissioner as the property of the company, is a fact from which, and from the circumstances accompanying it, the jury might infer the existence of such combination. For why, it may be asked, were these bonds applied for and delivered to Green, in order that they might be used to deceive the New York commissioner? And how is it to be accounted for that they were, for that purpose or any other, delivered over without discussion or negotiation, but upon the supposition of a prior agreement that they should be used by the directors for such a purpose when the necessities of the company should require? We think the evidence of the delivery of these bonds by Richardson to Green was not only admissible, but the fact of such delivery was, in our judgment, highly significant of such prior understanding or agreement. The conduct of Richardson and Green, in relation to the delivery of these bonds, seems to us unaccountable upon any other hypothesis.

The evidence, therefore, was legal and admissible, so that the defendant has no reason to complain of the charge, even if the question of the admissibility of the evidence was, as he claims, submitted to the jury, because the only effect of the mistake, if one was made, was to give the defendant an opportunity to take the opinion of the jury upon a question which would and ought to have been decided against him by the court.

Both of the defendants' motions ought to be denied.

In this opinion the other judges concurred.

LIABILITY OF OFFICERS OF CORPORATION FOR FRAUD, MISMANAGEMENT, AND NEGLIGENCE: *Neall v. Hill*, 76 Am. Dec. 508, note 515. The liabilities of directors of corporations is the subject of the note to *Hodges v. New England Screw Co.*, 53 Id. 637 651.

CHAPIN v. PERSSE AND BROOKS PAPER WORKS.

[80 CONNECTICUT, 461.]

MATERIAL-MEN NEED NOT ALSO BE CONTRACTORS OR SUBCONTRACTORS in order to have a lien upon a building, for materials furnished for its erection or repair, under the Connecticut statutes. An earlier statute, confining the lien to contractors and subcontractors, is superseded by later statutes extending the lien to material-men.

MERE GENERAL SALE OF BUILDING MATERIALS DOES NOT CREATE LIEN upon buildings upon which they afterwards happen to be used.

LIEN DOES NOT ATTACH TO BUILDING FOR WHICH MATERIALS ARE EXPRESSLY FURNISHED, if they do not, in fact, go into the building.

TO ENTITLE MATERIAL-MAN TO LIEN, HIS PROPERTY MUST NOT ONLY BE FURNISHED for the erection or repair of a building, but must actually go into the building.

MATERIAL-MAN'S LIEN, UNDER CONTRACT TO FURNISH SUCH MATERIALS AS BUILDER MAY REQUIRE, who contemplates building several houses on different lots, for which separate accounts with each house are to be kept, must be a separate and distinct lien on each separate building, with its appurtenances, to the amount of material furnished for and used upon such building; and a certificate filed in such case, in which the three buildings are included together, and a lien claimed on them all for the gross amount of materials furnished for each and all of them together, is void.

MECHANIC'S LIEN LAW IS TO BE CONSTRUED WITH REASONABLE STRICTNESS, since it gives a preference to certain creditors by giving them a lien, whereas the policy of the law favors an equal distribution of the effects of a failing debtor.

QUESTION OF EFFECT UPON MECHANIC'S LIEN OF PAYMENT, BY SUBSTITUTION OF ANOTHER SECURITY for the debt, must be left an open question in Connecticut, notwithstanding the remarks in *Rose v. Persse & Brooks Paper Works*, 29 Conn. 256.

BILL for the foreclosure of a lien for materials furnished to three mills belonging to the defendants. The case was reserved for the advice of this court. The opinion states the case.

T. O. Perkins and O. E. Perkins, for the petitioners.

F. Fellowes and C. E. Fellowes, for the respondents.

amount cannot now be ascertained, yet the plaintiffs' property did go into these mills to an amount exceeding one thousand four hundred and sixty dollars; and we do not see why, if they were on other grounds entitled to a lien for the amount which actually did go into the buildings, they would not be entitled to a decree for this amount, although it may be that other property which they furnished for the same purpose was misapplied.

But a more material question is, whether the certificate filed in this case is valid for any purpose. The statute requires that the claimant shall describe the premises and the amount claimed as a lien thereon in his certificate, which must be in writing, subscribed and sworn to, the amount being stated as the amount justly due, so near as the same can be ascertained. Does this certificate answer these requisites? The defendants had three paper-mills with their appurtenances, two of them on one piece of land, and one on an entirely separate piece, and the contract under which the lien is claimed was that the plaintiffs should furnish such an amount of lumber and other materials as should be wanted for the erection of additions to and for the completion and repair of the three mills, which was to be delivered from time to time to the workmen employed on the mills as they should want them; and the petitioners were requested to keep an account of the respective materials so furnished to each of the mills, and the account was in fact thus kept with each mill separately.

The case therefore does not differ materially from a contract to furnish all the lumber or other material which a builder may require who contemplates building several houses on different lots (and whether in the same town or not would seem to make no difference), for which separate accounts with each house are to be kept. Now, the lien under such a contract, if it indeed amounts to a lien, or is anything more than a contract for the sale of merchandise, the amount or quantity of which is to be determined by the amount wanted for certain purposes, must, as we think, be a separate and distinct lien on each separate building with its appurtenances; and there was therefore in this case not one lien on three buildings, but three liens, each for the amount of the material that was delivered for the erection or repair of the particular mill upon which in point of fact it was put. But in the certificate, the three mills are all included together, and a lien claimed on

them all for the gross amount of the materials furnished for each and all of them together, thus attempting to make the whole three mills together liable for the materials furnished for each one separately. We cannot think that this was intended to be allowed by the statute, which, as it gives peculiar privileges to certain creditors, contrary to the general policy of our law, which favors an equal distribution of the effects of insolvents, should, as we think, be construed with reasonable strictness. If such a course as was here attempted could be justified, then it would seem to follow that general contracts with builders to furnish materials for such houses as they might build within any limited time, or perhaps indefinitely, would bind all the buildings together for the materials furnished for all, and the inconvenience and injury to persons who had separate claims for work or materials for each of the buildings separately, would be intolerable. The order in which liens take precedence, which by the statute is to depend upon the commencement of the services or of the furnishing of the materials, would, by this course, be so far disturbed that the law intended for the protection principally of mechanics would frequently be perverted to their great injury, by making their claims subject to the prior claims of merchants, whose liens may have had their commencement in the furnishing of materials for buildings completed before their work commenced, and of which they had no knowledge. We think, therefore, that this certificate neither described the premises on which the lien was claimed nor the amount of the claim itself, and therefore, was wholly ineffectual to secure the continuance of it.

There were other points made in the case which we have not examined, because we are satisfied, on the point just stated, that the plaintiffs can take nothing by their bill. Much reliance, however, was placed by the counsel for the defendants upon certain receipts given by the plaintiffs, which were supposed to have extinguished this lien, if it ever existed; and the case of *Rose v. Persse & Brooks Paper Works*, 29 Conn. 256, was relied upon in support of their views on this point. It is true that the receipts in this case are very similar to the receipts mentioned in the case cited, which the court was inclined to think discharged the accounts for which they were given. No distinction can be made, we think, between a receipt in full and a receipt which expresses upon its face that what was received was in payment of the account.

since a receipt in full, unexplained, means full payment. It is worthy of remark, however, that in the case referred to no distinction was suggested by counsel, or noticed by the court, in respect to its effect upon the security or lien, of payment of the account by the substitution of the notes of the debtor accepted or received in payment therefor, and a payment in cash, which of course would so extinguish the debt, both in law and in equity, that the security, whether by way of lien or otherwise, would fall with it. Considering, therefore, that what was said in that case, undoubtedly correct in respect to an action at law upon the original account, was not necessary at all to the decision of the case, one decisive point in which was, as in this case, the invalidity of the certificate, we think the question of the effect of a payment by the substitution of another security for the debt, upon a lien such as is supposed to have existed in this case, ought still to be left as an open question, notwithstanding the remarks made in the case alluded to.

The superior court is advised to dismiss the plaintiffs' bill.

In this opinion the other judges concurred.

LIEN OF MATERIAL-MEN.—Estates and interest affected by mechanics' liens: Note to *Lyon v. McGuffey*, 45 Am. Dec. 678 et seq.; note to *Loomie v. Hogan*, 61 Id. 688-700. What structures are subjects of mechanics' liens: Note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Id. 691. In the majority of the states, material-men are secured equally with subcontractors. Formerly the rights of material-men were not usually recognized, and the lien for materials was given only to the contractor or mechanic who furnished them in connection with the construction. At present, however, the lien is generally extended to material-men or those persons who supply materials for the structure and have no other connection with the work. The original contractor is almost universally provided for under mechanic's lien statutes. And in the majority of the states, the subcontractor and the material-man are given a lien, either directly upon the land and building, to secure amounts due for work and materials, or, as is usually the case, they are permitted to notify the owner of their claims and obtain a lien upon the property to the extent of the balance due from the owner to the contractor at the time of filing the lien or serving the notice. Or else they have a simple right of action to recover against the owner to the amount of such unpaid balance without a lien.

STATUTES UNDER WHICH MATERIAL-MAN HAS NO LIEN.—The mechanics' lien law must be applied as it exists, and the courts have no power to extend the statute, which is restricted in its application to a particular class of persons, to a person not in that class. So, under a statute providing that "all artisans, builders, and mechanics of every description, who shall perform any work and labor on any building shall have an absolute lien on such building for such work and labor, as well as for materials furnished by them in and about such work and labor," a lumber-man will have no lien, since he is neither

artisan, builder, nor mechanic; though a mechanic or builder may include in his lien the price of materials furnished for the structure: *Duncan v. Bateman*, 23 Ark. 327; affirmed in *Boutner v. Kent*, Id. 369. A statute giving a lien to a mechanic or undertaker (contractor), for work done and materials furnished, does not extend to the person from whom the mechanic or undertaker may procure material: *Greenwood v. Tennessee Mfg. Co.*, 2 Swan, 130; nor to one who furnishes the owner with building materials: *Stevens v. Wells*, 4 Sneed, 387. So a material-man is not included within a statute giving a lien to the mechanic who does the work and furnishes the materials, for he is not a mechanic: *Auman v. Corban*, 4 Bart. 74. Nor is he included within the term "mechanics and artisans:" *Huck v. Gaylord*, 50 Tex. 578; or "masons and carpenters:" *Piets v. Bomar*, 33 Ga. 96. The term "machinists" does not embrace persons who merely sell machinery: *Kirkpatrick v. Bank of Augusta*, 30 Id. 465. A lumber dealer who furnishes materials to a contractor is not a person "doing or performing work towards the erection of the building," though he had some of the lumber dressed at a saw-mill according to directions: *Burst v. Jackson*, 10 Barb. 219. And a dealer in blinds, doors, and sashes, who furnishes these and fits them upon the building, is not a laborer so as to be entitled to a lien: *Arnold v. Budlong*, 11 R. I. 561. A mere material-man can have no lien under a statute providing that a building shall be liable "for all work done in the construction of such building, and for the material used in the construction thereof, which have been furnished by any person who had contracted or been requested, as aforesaid, to construct the same:" *Sweet v. James*, 2 Id. 270. So where the statute gives a lien to the contractor alone, where the contract for the work is in writing, in such case no one but the contractor will have a lien: *Ayres v. Revere*, 25 N. J. L. 474; see *Van Pelt v. Hartough*, 31 Id. 331.

MATERIAL-MAN WILL HAVE NO LIEN WHERE STATUTE GIVES LIEN TO THOSE CONTRACTING WITH OWNER OR HIS AGENT, unless he so contracts to furnish materials, and furnishes them at the instance of the owner or his agent. He will have no lien for supplying materials to the contractor: *Dawson v. Harrington*, 12 Ill. 300; *Shotwell v. Kilgore*, 26 Miss. 125; *Hunter v. Blanchard*, 18 Ill. 318; S. C., 68 Am. Dec. 547; *Williams v. Chapman*, 17 Ill. 423; S. C., 65 Am. Dec. 669; *Gaty v. Casey*, 15 Ill. 192; *Murray v. Earle*, 13 S. C. 87; *Toledo Novelty Works v. Bernheimer*, 8 Minn. 118; *Consociated Pres. Soc. v. Staples*, 23 Conn. 544; *Kelley v. Bank of South Carolina*, 1 McMull. Ch. 431; *Cornell v. Barney*, 94 N. Y. 394; *Rogers v. Phillips*, 8 Ark. 366; S. C., 47 Am. Dec. 727; *Knapp v. Brown*, 11 Abb. Pr., N. S., 118; *Miller v. Hollingsworth*, 33 Iowa, 224. And the contractor is not the agent of the owner: *Deardorff v. Everhart*, 74 Mo. 37, overruling *Morrison v. Hancock*, 40 Id. 564. Where it was enacted that the provisions of the lien law should extend only to work done on or materials furnished for new buildings, or to a contract entered into with the owner of any building for repairs, no lien could be obtained on a building for materials furnished therefor to a contractor, to be used in repairing the same, under a contract to which the owner was not a party. Nor did the fact that the owner knew that the materials used in repairing the building were being purchased by the contractor from the party who claimed the lien, tend to establish any claim against the premises: *Woodward v. McLaren*, 100 Ind. 586. And a note executed and recorded after the performance of the work, reciting that it was "for tin-work and material furnished by them on my house and homestead," was held not to be a contract for the performance of work under which a mechanic's lien might arise: *Reese v. Corless*, 60 Tex. 70.

Unless expressly required by statute, the contract with the owner or his agent need not be either by express agreement or in writing, but may be oral, and either express or implied: Phillips on Mechanics' Liens, sec. 114. And therefore, in the absence of such statutory requisite, an owner who receives the labor and materials of another about his building will be responsible to such person, and the latter will have a lien as if "contracting" with the owner: *Holmes v. Shands*, 26 Miss. 639; 27 Id. 40. The contract between the owner and the material-man may be an implied one: *Barnes v. Thompson*, 2 Swan; *Alley v. Lanier*, 1 Coldw. 540; *Neilson v. E. R. Co.*, 51 Iowa, 184. Under the law of New York, the simple consent of the owner of real estate to the making of any erections or improvements thereon is sufficient to give one performing labor or furnishing materials therefor, and who has filed the prescribed notice, a lien upon the land; it is not essential that the owner himself should have contracted for the erections or improvements: *Otis v. Dodd*, 90 N. Y. 336; see Phillips on Mechanics' Liens, sec. 114 a. So a supplying of material sufficient to create a debt between the owner and the material-man is sufficient to create a lien: *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32. But where the statute requires it, the contract must be express, or there will be no lien: *Parker v. Anthony*, 4 Gray, 289; *Hatch v. Coleman*, 29 Barb. 201; *McRae v. Creditors*, 16 La. Ann. 305. Contracts with agents of the owner: See note to *Loonie v. Hogan*, 61 Am. Dec. 695, 696. It is sometimes provided by the statute that the contractor be deemed the agent of the owner: *Quale v. Moon*, 48 Cal. 478.

WHEN MATERIAL-MAN, DEALING WITH CONTRACTOR, HAS LIEN.—The mechanic's lien is purely statutory, and therefore, as we have seen, unless the material-man comes within the terms of the statute, he is not entitled to the lien. And even when he does come within the terms of the statute, he will have no lien against the owner for furnishing materials to a contractor, unless the statute specially gives him a lien: *Clark v. Hall*, 10 Kan. 80. Where, however, the statute secures a lien to subcontractors, a material-man dealing with an original contractor, that is, a contractor contracting with the owner, receives, as a general rule, equal protection: Phillips on Mechanics' Liens, sec. 46. Thus, where the statute provides that "every dwelling-house, etc., shall be subject to the payment of debts contracted for, or by reason of any work done, or materials found and provided by any brick-maker, mason, etc., or any other person or persons employed in furnishing materials for, or in erecting any such house, before any other lien," etc., the lien given thereby extends equally to the subcontractor and material-man who perform labor or furnish materials upon the order of the contractor: *Winder v. Caldwell*, 14 How. 434. Likewise, a statute enacting that "every building erected shall be liable for the payment of any debt contracted and owing to any person performing work or furnishing materials for the erection and construction thereof," gives a lien to all who, under any circumstances, perform labor in the erection of the building, or who furnish materials which enter into its structure. And even when this law is qualified by another provision, "that when the building is erected in whole or in part by a contract in writing, the building and land shall be liable to the contractor alone for work and materials done under such contract," it becomes incumbent upon the owner, who seeks exemption from the operation of the former statute, to bring himself clearly within the second proviso, and he must not only show that the work was done by contract merely, but also that the contract was in writing, in order to take away the right of mechanics and material-men to liens: *Van Fell v. Hartough*, 31 N. J. L. 331.

Persons supplying materials to a material-man or a subcontractor must come clearly within the terms of the statute, or they can claim no lien. They are so far removed from the owner that the privilege of a lien is not often extended to them; and the plainest expressions of law must be used to entitle them to this remedy: *Kerby v. McGarry*, 16 Wis. 68. Thus where the power to create liens on the building was given by statute to "an architect, builder, or contractor for the erection of a building," this power of creating liens did not extend to a lumber dealer employed to furnish lumber, whether manufactured or not. Such a person is a mere material-man, and not a contractor for the erection of the building. His is not a contract to erect, but merely a contract to furnish materials toward the erection. Therefore, he is not contemplated by the statute, and persons furnishing materials to him can have no lien: *Duff v. Hoffman*, 63 Pa. St. 191; see *Schenck v. Uber*, 81 Id. 31; *Kitson v. Crump*, 9 Phila. 41. So under a law subjecting property to liens for work and materials supplied under contract with the owner or his contractor "to erect or construct the building," a contractor to put in an elevator cannot subject the building to a lien in favor of one whom he employed to furnish the cage for the elevator. This law does not, however, confine the erection of a structure to a single contractor. Several contractors may be employed, to whom may be intrusted respectively the erection of the main divisions of the edifice, with power to each in his department to bind the building with a lien. But the contract for an elevator is not a contract for a primary division of the building, but is a minor and auxiliary contract: *Schenck v. Uber*, 81 Pa. St. 31; *Kitson v. Crump*, 9 Phila. 41; see also *Singerly v. Doerr*, 62 Pa. St. 9; *Derrickson v. Nagle*, 2 Phila. 120.

Material-men in the second degree may, however, be provided for by statute which expresses with sufficient clearness an intent to this effect. Thus, one who supplies materials to a subcontractor is included within a law which gives a lien to "any person who shall, in pursuance of any contract, express or implied, either with the owner of the property or any contractor, perform any labor or furnish materials, etc., or any person who has made a contract for the same, shall be deemed to have an equitable lien for the same upon such house," etc.: *Lumbard v. Syracuse R. R. Co.*, 64 Barb. 609. A statute providing that "mechanics and all persons performing labor or furnishing materials for the construction, etc., may have a lien," etc., gives a lien to the material-man of a subcontractor: *Barker v. Buell*, 35 Ind. 297. But even under such statutes as these, the material-man must see that by the circumstances of his case he is brought within the terms of the statute. Thus in *Bates v. Emery*, 134 Mass. 186, a builder of a vessel made an agreement with A that when she was finished A should furnish sails, which were to remain A's property, and that A should use her, and give the builder a portion of her earnings. A falsely represented that he owned the hull, and made a contract with a sail-maker, under which sails were furnished, and A used the vessel. It was held that the sail-maker could not enforce a lien against the vessel; for the sails were not furnished by virtue of a contract with the agent contractor or subcontractor of the owner.

MATERIALS MUST BE FURNISHED FOR BUILDING, AND NOT EXCLUSIVELY UPON CREDIT OF OWNER OR CONTRACTOR.—The mechanic's lien law contemplates a contract or agreement more specific than an ordinary sale of materials. It should be understood between the parties that the materials are to be used in the erection or reparation of a building. If a material-man sells his materials without any understanding as to their application, he can assert no lien upon the building upon which they may be used. He relies exclu-

sively upon the credit of the buyer, and takes no security. He does not sell for the special purposes named in the statute, but for any purpose that may seem good to the buyer. The lien is acquired, therefore, only when the materials are furnished with an understanding that they are to be used for a purpose named in the statute: *Choteau v. Thompson*, 2 Ohio, 114; *Cotes v. Shorey*, 8 Iowa, 416; and not when they are supplied under an ordinary sale on credit, though the buyer may actually use them in building a house: *Hill v. Bishop*, 25 Ill. 349; *Fuller v. Nickerson*, 69 Me. 236; *Mehan v. Thompson*, 71 Id. 492; *Rogers v. Currier*, 13 Gray, 129; *Eeslinger v. Huebner*, 22 Wis. 632; *Hills v. Elliott*, 16 Serg. & R. 56; *Weaver v. Sells*, 10 Kan. 609; affirmed in *Delahay v. Goldie*, 17 Id. 265.

Equally fatal to the lien is it that the materials were furnished exclusively upon the credit of the contractor, for the transaction then is an ordinary sale to the contractor, out of which no lien can arise. It is necessary that the materials be furnished for the specific purpose named in the statute, for the erection, construction, or reparation of a building, and the like: The principal case; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; S. C., 64 Am. Dec. 675; *Presbyterian Church v. Allison*, 10 Pa. St. 413; *Lawton v. Case*, 73 Ind. 60; *Wetherill v. Ohlendorf*, 61 Ill. 283; *Lanier v. Bell*, 81 N. C. 337; *House v. Carroll*, 37 Mo. 578. A material-man cannot enforce a lien against a building if the materials were not furnished upon the credit of the building but upon that of the contractor; and even if furnished upon the credit of the building, if the contract was unfairly made for an exorbitant price, the material-man could only recover as against the building what the materials were fairly worth: *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; S. C., 64 Am. Dec. 675. Where a lien is given for materials "furnished the owner of a building," it attaches only to the building erected by the purchaser with the materials, and does not follow the materials into the hands of a vendee of the purchaser, and attach to a building that such vendee may use them to erect, even though the vendee knew they were not paid for: *Heaton v. Horr*, 42 Iowa, 187. So, also, the lien will cover only labor and materials furnished by the lienor and by others employed by him, and not materials or labor procured by him as agent for the owner, and in his name, and on his credit, although the lienor afterwards pays for them: *Kerby v. Daly*, 45 N. Y. 84. Whether the materials were furnished on the credit of the building or of the contractor is a question for the jury: *Hommel v. Lewis*, 104 Pa. St. 465.

Proof of Nature of Contract.—The burden of proving that the sale was made upon the personal credit of the owner or contractor is upon the person who asserts it: *Hommel v. Lewis*, 104 Pa. St. 465; *Power v. McCord*, 36 Ill. 214. When the materials are furnished and placed in the building, in the absence of evidence showing a different intention, it will be presumed, and the jury is warranted in inferring, that they were furnished for the purpose of being used in that building: *Power v. McCord*, *supra*; *Martin v. Eversal*, 36 Ill. 222. It is not necessary for the material-man to allege in his lien, or to prove affirmatively, that his materials were furnished upon the credit of the building, if it be shown that they were furnished for and entered into its construction: *Hommel v. Lewis*, 104 Pa. St. 465. That they were furnished upon the credit of the building may be shown by evidence of an express agreement, or by proof of circumstances from which the purpose may be inferred, a tacit understanding being as good as an express one: *Choteau v. Thompson*, 2 Ohio, 114. And a jury may be satisfied to this effect without the introduction of direct and positive proof of the fact: *Cotes v. Shorey*, 8 Iowa, 416.

The fact that the materials are charged upon the plaintiff's books to the

contractor alone may afford some slight evidence that they were furnished on his credit, but it is not *prima facie* evidence that his credit was relied upon to the exclusion of the credit of the building: *Hommel v. Lewis*, 104 Pa. St. 465; see *Presbyterian Church v. Allison*, 10 Id. 413. Such an entry upon his books is not a waiver of the lien by the material-man: *Presbyterian Church v. Allison*, *supra*. And in Maryland, where, in order to protect mechanics and dealers from frequent losses occurring through the delinquency of contractors, a statute was passed giving a lien on the building "for the payment of all debts contracted for work done or materials furnished about the same," it is held that under this statute the mere fact that the materials are furnished on the credit of the contractor, and not on the credit of the building, is not a waiver of the lien; and even a declaration of the material-man, releasing the owner from liability, did not constitute a waiver, being merely a parol relinquishment without consideration of a valuable right: *Sodini v. Winter*, 32 Md. 130.

No presumption, however, prevails in favor of one who supplies a material-man with materials, and usually he will have to look to his vendee for payment: *Horton v. Carlisle*, 2 Disney, 184; *Bennett v. Shackford*, 11 Allen, 444.

Whether Particular Building must be Contemplated by Contract.—Though the materials must be furnished upon the credit of a building, it is not necessary that the land or building be described in the contract, unless the statute requires it: *Montandon v. Deas*, 14 Ala. 33. Thus a contractor or material-man may have a lien upon a building, though at the time of entering into the contract it was not known where the building was to be erected: *Choteau v. Thompson*, 2 Ohio, 114. So where the statute was that "every person who, by virtue of a contract with the owner of a piece of land, performs work or furnishes materials especially for any building," it was held that the words "especially for any building" meant materials furnished for building purposes, as distinguished from general or unknown purposes, rather than that the materials should be furnished for any particular building: *Cotes v. Shorey*, 8 Iowa, 416; *Atkins v. Little*, 17 Minn. 353.

But if the intention of the statute appears to be that a particular lot or building be contemplated by the contract, this becomes essential. Thus where the statute provided that "any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building on such land or lot, shall have a lien upon the whole tract of land or town lot," it is necessary for the contract to refer to some particular tract or town lot: *Burkhart v. Reisig*, 24 Ill. 529; *Hammond v. Wells*, 45 Mich. 11. So, under a statute giving a lien to any person furnishing materials "for the construction of such building:" *Horton v. Carlisle*, 2 Disney, 184; or "for the construction or repair of any building or wharf:" *Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Id. 240; or providing that "every building erected shall be subject to a lien for the payment of debts contracted for work done or materials furnished for or about the erection or construction of the same:" *Hills v. Elliott*, 16 Serg. & R. 56. In Indiana, the statutory phrase is, "for the construction or repair of any building;" and it is held that the material-man must show that the materials were furnished for the particular building, and it will not do merely to show that they were used in the building: *Hill v. Sloan*, 59 Ind. 186; *Miller v. Roseboom*, Id. 345. And where one furnishes building material, with the knowledge that it is to be used in the construction of a particular building, and sells it for that purpose, he may procure a lien on the building without any more definite or specific contract or agreement that the building material shall be used in the construction of the building: *Sturges v. Green*, 27 Kan. 235.

A material-man must aver and prove, in addition to averment and proof of notice required by statute, that the materials were furnished by him expressly for the building. It is not sufficient that in furnishing materials for the construction of several different buildings, on a general account with the contractor, he has kept an itemized account of the various materials used in each of said buildings, as the same were distributed by the orders of the contractor or owner: *Talbot v. Goddard*, 55 Ind. 496. "The theory of the law is, that credit is given to the identical building for which the materials are furnished or upon which the work is done. Each building represents a distinct and separate security. One building cannot be made to stand as the security for another. In truth, each building stands as a several debtor, and one can no more be made to discharge the debt of another building than one individual debtor can be made to pay a separate claim owing by somebody else to the same creditor." *Per Elliott, C. J.*, in *McGrew v. McCarty*, 78 Ind. 496; see also *Hill v. Braden*, 54 Id. 72. It must be alleged and proved that the materials were furnished for the particular building: *City of Cranfordville v. Lockhart*, 58 Id. 477; *Hill v. Ryan*, 54 Id. 118; *City of Cranfordville v. Brundage*, 57 Id. 262. See, however, *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248; *Doolittle v. Plenz*, 16 Neb. 153.

ITEMS NEED NOT BE STATED IN CONTRACT. The contract need not set out specifically the items to be furnished. It is proper to supply the materials from time to time when they are needed, and when they are furnished to the owner to charge them in the books in the ordinary manner: *Stockwell v. Carpenter*, 27 Iowa, 119; *Jones v. Swan*, 21 Id. 181. Where, however, the statute gives a lien for materials furnished on a contract with the contractor, the charges should be made in such manner that the owner may ascertain the liability of his house, upon application to the material-man, before he pays the contractor. If, however, the jury are satisfied that the materials were furnished for and about the erection or construction of the building, it is sufficient, and therefore the manner in which they are charged is not fatal to the lien, as any competent evidence that they were furnished upon the credit of the building is sufficient: *Wolf v. Batchelder*, 56 Pa. St. 87; *Hommel v. Lewis*, 104 Id. 465.

WHETHER MATERIALS MUST BE USED IN BUILDING: Note to *Odd Fellows' Hall v. Masser*, 64 Am. Dec. 678, 679, on mechanic's lien for materials furnished to be used, but not in fact used. The cases are in conflict upon this point—one line of authority, contemplating the relation of the owner and the material-man, gives the latter a lien for materials furnished for use upon the building, though not in fact used; and another line of authority, contemplating the relation of the various lien claimants, gives the material-man a lien only for those materials actually used upon the structure: Phillips on Mechanics' Liens, sec. 148. In addition to the authorities cited in the note above referred to, the following are in point: In Illinois, a lien for materials furnished attaches only where the material furnished has been actually used on the land and building. There must be not only a contract, but an actual use of the materials furnished: *Hunter v. Blanchard*, 18 Ill. 318; S. C., 68 Am. Dec. 547; *Williams v. Chapman*, 17 Ill. 423; S. C., 65 Am. Dec. 669; *Gaty v. Casey*, 15 Ill. 192. A lien cannot be enforced against a building for materials furnished to the contractor, but not put into the building. And the declarations of the contractor are not evidence against the owner; as, for example, declaration that materials purchased were used in a particular building: *Deardorff v. Everhart*, 74 Mo. 37, overruling *Morrison v. Hancock*, 40 Id. 564.

On the other hand, in Nebraska it is held that the lien of a material-man for materials furnished for the erection of a building under an agreement with the contractor extends to such materials as are used in or delivered at the building for use therein: *Foster v. Doble*, 17 Neb. 631; *Marrener v. Paxton*, Id. 634.

MEANING OF WORD "MATERIALS," AND WHAT IT INCLUDES.—The word "materials" is universally used in the statute, and it sometimes becomes a question whether articles furnished are properly included in this word. A fair and reasonable construction of the phrase "materials furnished for a building" is all such materials as ordinarily enter into or are used in the construction of buildings, and which are expressly or impliedly within the terms of the building contract between the owner and the contractor. So if the building contract requires the blasting and removal of rock upon the land preparatory to building, the powder and fuses necessarily used for this purpose are embraced within the term "materials:" *Hazard Powder Co. v. Byrnes*, 12 Abb. Pr. 469; S. C., 21 How. Pr. 189. Lightning-rods are within the protection of the lien where the statutory phrase is "any materials furnished for building:" *Quimby v. Sloan*, 2 E. D. Smith, 594. So, under the phrase "any materials, machinery, or fixtures:" *Harris v. Schultz*, 64 Iowa, 539. But under a statute giving a lien for materials and labor "in building, altering, repairing, or ornamenting" a house, it was held that a lien was not given for materials and labor furnished in placing lightning-rods on a house: *Dres v. Mason*, 81 Ill. 498. A mechanic's lien attaches for stage-machinery, scenery, and seats furnished for and placed in a theater: *Halley v. Alloway*, 10 Lea, 523; *Grewar v. Alloway*, 3 Tenn. Ch. 584. And under a statute giving a lien on a mine for "timber or other materials to be used in or about the mine," powder, steel, and candles, being indispensable materials for working the mine, are clearly within the statute: *Keystone Min. Co. v. Gallagher*, 5 Col. 23. So a hoisting apparatus necessary for and used in the erection of a building is included in the statute: *Dixon v. La Farge*, 1 E. D. Smith, 722; see also *Richardson v. Koch*, 81 Mo. 264. So of an elevator: *Schenck v. Uber*, 81 Pa. St. 31. A lumber dealer may have a lien for lumber supplied to make shelves for a vault which was a part of the original plan of the building where the statute subjected every building to a lien for the payment "of all debts contracted for work done or materials furnished for or about the erection or construction of the same:" *Harker v. Conrad*, 12 Serg. & R. 301. And under a statute subjecting a homestead to mechanics' liens "for the erection of improvements thereon, or for labor performed for the owner thereof, in improving the property," a lien attached to the homestead for the value of lumber furnished: *Gulledge v. Preddy*, 32 Ark. 433. The word "lumber" has been construed to embrace shingles: *Gross v. Eden*, 53 Wis. 543; and the word "timber," railroad ties: *Kollock v. Parcher*, 52 Id. 393.

LIEN FOR MACHINERY.—Machinery furnished for the operation of a manufactory, or for manufacturing purposes, and put into a building, will not ordinarily, under the statutes giving a lien for "materials" furnished in the construction, repair, etc., of a building, give a lien upon the building to which it is attached, but some more definite intention of the legislature to this effect must be expressed: *White v. Chaffin*, 32 Ark. 68; *Cohen v. Hager*, 30 Id. 28; *Rose v. Persse*, 29 Conn. 256; *E. T. Iron Mfg. Co. v. Bynum*, 3 Sneed, 268; *Greenwood v. Tennessee Mfg. Co.*, 2 Swan, 130. Where the statute provides that every building "shall be subject to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same," and the act is amended afterwards so

as to extend it to every steam-engine, coal-breaker, fixture, or machinery, etc., in and about mills of any kind, etc., and the original law gave a lien only for new erections, the amended statute does not extend the lien to alterations and changes, and so no lien upon the building is given where new machinery or fixtures are substituted instead of those formerly in the building: *Summerville v. Wann*, 37 Pa. St. 182; *Haslett v. Gillespie*, 95 Id. 371 ("work done, or materials furnished for or about the repair, alteration of, or addition to any house or other building").

In some states, however, express provision is made for a lien for machinery placed upon land, or else the existing statute is construed to include such a lien. A statute providing a lien for materials furnished in "the construction or repairing" of a building was held to give a lien to a vendor of machinery which was sold for the purpose of being placed in the building owned by the vendee, with a view of converting it into a manufactory, and was actually used for that purpose: *Donahue v. Cromartie*, 21 Cal. 80; but see Pennsylvania cases just above cited. Machinery manufactured and sent to the owner and set up by the latter will furnish the basis of a mechanic's lien: *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32; see also *Parriah v. Hazard's Appeal*, 83 Pa. St. 111. And where the statute gave a lien "to all persons doing work for, on, or about the erection, construction, or repair of any engine, etc., or for boring, drilling, or mining," etc., a person who contracts to drill an oil well and to furnish tools, rope, fuel, etc., to be used in the drilling, may file a lien therefor: *Vandergrift & Forman's Appeal*, Id. 131. Under statutes giving liens for machinery, the machinery must generally be attached to and become a part of the realty: *Graves v. Pierce*, 53 Mo. 423; *Schofield v. Stout*, 59 Ga. 537; *London v. Coleman*, Id. 654. The machinery must have been used in the construction of the building, or have become fixtures in the building: *Richardson v. Koch*, 81 Mo. 264. A mere vendor of machinery which may or may not go into a building has no lien under the statute providing a lien for every person "who shall construct, repair, or put up any machinery upon such land." The contract should relate to the land and be performed upon it: *Stout v. Sawyer*, 37 Mich. 315; see *Turner v. Wentworth*, 119 Mass. 459. The term "machinery," in a statute giving a lien to "every person who shall furnish any machinery or fixtures for any building," etc., does not include a sausage-grinder or coffee-mill such as families use; though if a person should fit up a sausage-grinding establishment, or a house for grinding coffee with machines for this purpose, he might have the benefit of the lien: *White v. Chaffin*, 32 Ark. 70. This statute will include machinery for a building already built as well as for one in process of erection: Id. Items furnished for repairs come fairly within a continuing agreement to furnish whatever shall be required in the way of fixtures and machinery for a manufactory, and may properly constitute a part of an account filed for a lien: *Allen v. Frumet Min. Co.*, 73 Mo. 688.

MATERIAL-MAN SHOULD SEE THAT MATERIALS CORRESPOND IN QUANTITY AND QUALITY with the character of the building for which they are intended, where the statute permits him to furnish the materials to the contractor on the credit of the building. It is his duty in such case to see that the materials are appropriate for the erection of such a building as is contemplated by the contract, and that they are not inordinate in quantity, and it is competent for the owner to show that the amount of materials charged in the material-man's account is greatly more than could have been used in the building, or that the materials furnished were unfit for use upon the building contracted to be constructed: *Dickinson College v. Church*, 1 Watts & S. 462; *Harlan v.*

Rand, 27 Pa. St. 511; *Boyd v. Mole*, 9 Phila. 118; *Campbell v. Scaife*, 1 Id. 187; *Foley v. Alger*, 4 E. D. Smith, 719; *Laird v. Moonan*, 32 Minn. 358. But a material-man is not bound to inquire into the character of materials which the contractor has agreed with the owner of the building to use in its construction, where the materials furnished are of the kind that would induce a careful, prudent, and skillful man, acquainted with the building, to believe that they could be used in its erection, and if they could, in fact, be usefully employed in its construction: *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; S. C., 64 Am. Dec. 675. And if the materials be furnished upon the order of the owner, these rules will not apply; for he of course may pledge his own property for any kind of materials: *Harland v. Rand*, 27 Pa. St. 511. And when the materials are within the scope of the contract, the material-man will have his lien, whether they were used in a usual or necessary manner, or not: *Harker v. Conrad*, 12 Serg. & R. 301.

LIENS FOR MATERIALS AND LIENS FOR LABOR are placed upon the same footing. One lien has no preference over the other, and the proceeds should be distributed *pro rata*: *Mosley v. Shepard*, 3 Cal. 64; *Bugfield v. Wheeler*, 14 Allen, 139. Nor has one kind of materials any preference over another: *Sweet v. James*, 2 R. I. 270.

ONE FURNISHING MATERIALS FOR UNLAWFUL STRUCTURE, such as a nine-pin alley, but who was unaware at the time that the structure was to be put to an unlawful use, will not lose his lien: *Dorsey v. Langworthy*, 3 Greene, 341; see *Bishop v. Honey*, 34 Tex. 245; Phillips on Mechanics' Liens, sec. 163.

ONE ADVANCING MONEY FOR MATERIALS HAS NO LIEN. One who advances money as a loan, although it is expressly for the purpose of paying for materials and labor devoted to the erection of a building, can claim no benefit of the lien law, as the liens provided for therein are exclusively for the security of material-men and laborers: *Godeffroy v. Caldwell*, 2 Cal. 489; S. C., 56 Am. Dec. 360; *Weatherby v. Sleeper*, 42 Miss. 741; *Dart v. Mayhew*, 60 Ga. 104; *Gaylord v. Loughridge*, 50 Tex. 573. And one who guarantees a debt for lumber, and afterwards pays it, has no right to a lien on the building upon which the lumber was used: *Ruggles v. Blank*, 15 Ill. App. 436.

TAKING PROMISSORY NOTE FOR DEBT SECURED BY MECHANIC'S LIEN, EFFECT UPON LIEN: *Bailey v. Hull*, 78 Am. Dec. 706, and note 709; note to *Goble v. Gay*, 41 Id. 221-224; *Steamboat Charlotte v. Hammond*, 43 Id. 536, and note 539. Issuance of attachment for the same debt: *Brennan v. Seasey*, 76 Id. 507, note 508. In *Beers v. Knapp*, 5 Ben. 108, it was held that taking promissory notes for the debt does not extinguish it and avoid the lien, unless it is so expressly agreed; and the remarks made in the principal case were said to have no application.

MECHANIC'S LIEN AOTS SHOULD BE LIBERALLY CONSTRUED: *Montandon v. Dens*, 48 Am. Dec. 84.

THE PRINCIPAL CASE IS CITED to the point that the material-man must aver and prove that the materials were furnished by him expressly for the building, and it is not sufficient that they were used in the building: *Talbot v. Goddard*, 55 Ind. 502. A joint claim cannot be supported by proof of a separate right; one building cannot be made to discharge the debt of another: *McGrree v. McCarty*, 78 Id. 498. In *Larkins v. Blokeman*, 42 Conn. 294, materials were furnished under separate contracts for two houses that were being constructed by the same builder upon adjoining lots, one being commenced about six weeks before the other. No separate account was

kept of the materials furnished to either house, and it could not be ascertained how much had gone into either. The material-man filed a single lien on the two houses by a certificate stating the whole amount furnished for the two. This was held to be a void lien. The court could not distinguish the case from the principal case, and held it to be immaterial that there was an understanding between the parties that there should be one lien on both houses. But where a block of buildings, comprising several dwelling-houses, is erected upon a single lot, and work is done upon it as a whole under one entire contract, the builder's lien extends, as a single lien, to the whole block: *Brabson v. Allen*, 41 Conn. 364, distinguishing the principal case.

McCUNE v. NORWICH CITY GAS COMPANY.

[80 CONNECTICUT, 521.]

ALLEGATION OF DUTY OR LIABILITY IN DECLARATION IS OF NO AVAIL, unless the facts necessary to raise it are stated. It is but the statement of a legal inference never traversable and of no avail in pleading. Such defect is not cured by verdict.

GAS COMPANY MAY REFUSE AT PLEASURE TO SUPPLY GAS TO CONSUMER in the absence of any contract or special provision in the charter. Maker of gas is subjected to no greater duties and liabilities than the manufacturers and vendors of other commodities.

DECLARATION IN ACTION AGAINST GAS COMPANY FOR CUTTING OFF PLAINTIFF'S GAS SUPPLY, alleging that the gas-pipes of the plaintiff and defendant were united, and up to a specified time defendants had supplied plaintiff with gas by means of such pipes and had been paid for it, and that plaintiff desired to take defendants' gas, and was ready and willing to pay for it as before, and that it was the duty of the defendants to supply plaintiff with gas, but that they maliciously shut off the gas and refused to supply him—states no title or right of recovery, and is not cured by verdict; and after verdict, judgment will be arrested on the ground of the insufficiency of the declaration. Had the plaintiff declared upon a contract to supply him with gas until reasonable notice given of an intention to discontinue, the jury might perhaps have found such contract and its violation; but the mere allegation of duty is of no avail.

ALLEGATION THAT ONE DID MALICIOUSLY AND WANTONLY SOMETHING HE HAD RIGHT TO DO states no cause of action. Motive for doing a lawful act is immaterial.

VERDICT IN FAVOR OF PLEADER ESTABLISHES TRUTH OF ALL HIS MATERIAL ALLEGATIONS OF FACT, and nothing more, and when a fact material to the plaintiff's right of recovery is omitted altogether from his declaration, or is not so connected with other facts which are stated that the latter cannot be proved without proving the former, the verdict of the jury ascertains nothing in regard to such omitted fact, and cannot aid the declaration.

CASE for shutting off gas from the plaintiff's rooms. Verdict for the plaintiff, and motion in arrest of judgment by the defendants for the insufficiency of the declaration. This mo-

tion was reserved for the advice of this court. The opinion states the case.

Wait and Crosby, in support of the motion.

Halsey and Chadwick, contra.

By Court, SANFORD, J. This is a motion in arrest for the insufficiency of the declaration. There are two counts, but in all their material allegations they are substantially alike, and the same questions arise on both of them.

The plaintiff alleges that the defendants were a corporation, created for the purpose and engaged in the business of making, distributing, and selling illuminating gas, and that they had laid down their main pipes in the streets and lanes of the city for the conveyance of gas to their customers; that the plaintiff's rooms had been fitted up with gas pipes and fixtures, connected with the defendants' main pipes, and that for some time immediately prior to the fifteenth of November, 1858, the defendants had by means of said pipes supplied the plaintiff with gas for lighting said rooms for a certain reasonable compensation paid therefor, and that the plaintiff desired to continue to light his said rooms with gas as aforesaid, and was ready and willing to pay to the defendants a reasonable compensation for the same, and to abide by all the reasonable rules and regulations of said company, and requested the defendants to continue to supply said rooms with gas; and that it then became and was the duty of the defendants to continue to supply the plaintiff with gas for the purposes aforesaid on the conditions aforesaid; yet that the defendants, not regarding their said duty, but contriving and intending to vex and annoy the plaintiff in the use and enjoyment of his said premises, maliciously, wantonly, and without any justifiable cause, and contrary to the mind and will of the plaintiff, refused to supply the plaintiff with gas, and shut off the same from entering the gas-pipes of said rooms, etc.; by reason whereof, the plaintiff has been deprived of the means of lighting said rooms with gas, and of the use and enjoyment of said gas-fixtures, and has been put to great expense in providing other means of lighting said rooms, etc.

No contract for the supply of gas for an indefinite period is alleged to have been made by the defendants, nor indeed any contract at all. The entire foundation of the plaintiff's claim, as it is set out in this declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue

necessary or natural connection, and the one may be proved without giving any evidence of the other. And yet, in the case last supposed, it would be the duty of the jury to give their verdict for the plaintiff, although a judgment for him thereon would be erroneous; the province of the jury being to decide whether the material allegations in the declaration are true or false, and to render their verdict accordingly.

The verdict of the jury in favor of the pleader, therefore, establishes the truth of all those material allegations of fact which the pleader makes, and nothing more. And when a fact material to the plaintiff's right of recovery is omitted from his declaration altogether, and is not so connected with other facts which are stated that the latter cannot be proved without proving the former, the verdict of the jury of course ascertains nothing in regard to such omitted fact, and cannot aid the declaration.

This seems to be the logical as well as legal corollary from the settled propositions, that no evidence is admissible to prove any fact not stated in the pleadings and involved in the issue, and that the court will never presume that illegal evidence was received upon the trial: Stephen's Pl. 167 et seq.; Gould's Pl. 496 et seq.

In the case at bar, the title or right of recovery set up by the plaintiff in his declaration is the supposed duty or obligation imposed upon the defendants by law to supply the plaintiff with gas, and the facts out of which that duty is claimed to have arisen are, that the gas-pipes of the plaintiff and the defendants were united, that up to a specified time the defendants had supplied the plaintiff with gas by means of such pipes and had been paid for it, and that the plaintiff desired to continue to take the defendants' gas, and was ready and willing to pay for it as he had done before; which, as we have already said, is the statement of no title at all, for on these facts the law raises no such duty or obligation as the plaintiff claims.

We think the motion in arrest ought to prevail, and we advise accordingly

In this opinion the other judges concurred.

GAS COMPANY, IN ABSENCE OF ANYTHING TO CONTRARY IN ITS CHARTER, MAY MAKE AND SELL GAS, fix its own price, and choose its own customers, like the manufacturer of any other article. Gas need not be furnished to all persons living along the line of the company's pipes, even if a reasonable com-

penation be tendered: *Paterson Gas Light Co. v. Brady*, 72 Am. Dec. 360. The duties of gas companies are treated in the note to *Shepard v. Milwaukee Gas Light Co.*, 70 Id. 485-489, citing the principal case at page 486.

PLEADING SHOULD STATE FACTS, NOT INFERENCES: *Green v. Palmer*, 76 Am. Dec. 492, and note 498. A declaration containing a bare statement of a conclusion of law, without an allegation of facts sufficient to warrant the conclusion, is demurrable: *Pipp v. Reynolds*, 20 Mich. 93, citing the principal case.

DEFENSE CURED BY VERDICT: *Roper v. Clay*, 59 Am. Dec. 314, and note collecting prior cases 320.

WHERE PERSON HAS LEGAL RIGHT, HIS MOTIVE IN ASSERTING IT IS IMMATERIAL; but where a corporation obtains title to property for the sole purpose of making a malicious use of it, the motive becomes material as affecting the question of the power of the corporation: *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 540, distinguishing the principal case. And a declaration alleging that the plaintiff had contracted with a town to keep a highway in repair, and that the defendant, intending to injure the plaintiff, deposited a quantity of stone and rubbish on the road, by which the road was injured by the obstruction of a drain, and the consequent flow of water over the road, and the plaintiff subjected to great expense, was good on demurrer: *McNary v. Chamberlain*, 34 Conn. 394, distinguishing the principal case, which was cited by counsel to the point that the injury was too remote.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

CITY OF APALACHICOLA v. APALACHICOLA LAND CO.

[9 FLORIDA, 240.]

ON APPLICATION FOR INJUNCTION, CHANCELLOR MAY GO INTO CONSIDERATION OF MERITS as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges.

ON MOTION FOR INJUNCTION, COURT WILL NOT COMMIT ITSELF to points or questions that may arise at the final hearing.

JUDGMENT IN EJECTMENT IS CONCLUSIVE AGAINST DEFENDANT FOR ALL PROFITS accrued since the date of the demise stated in the declaration in ejectment; but if the plaintiff sues for antecedent profits, the defendant may make a new defense.

RIGHT TO MESNE PROFITS IS NECESSARY CONSEQUENCE OF RECOVERY IN EJECTMENT.

EASEMENT FOR PUBLIC IN STREET DEDICATED TO CITY IS REAL FRANCHISE holden by the corporation for the benefit of all the citizens.

CITY, LIKE INDIVIDUAL, HAS RIGHT TO RECOVER MESNE PROFITS after recovering in ejectment possession of street and wharves erected by defendant at the end thereof.

CITY HAVING POWER TO ERECT WHARF MAY IMPOSE TOLL FOR USE THEREOF.
PLAINTIFF, AFTER RECOVERY IN EJECTMENT, CANNOT TURN HIS ACTION AT LAW FOR MESNE PROFITS INTO SUIT IN EQUITY, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances, including all cases which involve an equity, which the plaintiff cannot make available at law.

SUIT IN EQUITY LIES FOR ACCOUNT OF MESNE PROFITS, after recovery in ejectment, where bill shows right to discovery and relief in a matter connected therewith, for equity, having obtained jurisdiction to this extent, will proceed to settle finally the whole merits of the cause.

WHERE FACE OF BILL SHOWS CASE BARRED BY STATUTE OF LIMITATIONS, and no circumstances are stated which take the case out of the operation of the act, the defendant may take advantage of it by demurrer, and is not bound to plead or answer.

TO JUSTIFY ARREST, BY INJUNCTION, OF EXECUTION OF DECREE OF CHANCERY establishing certain claims, it must be shown that the applicant has a prior right which he has not lost by laches.

BILL in equity against Curtis and others, trustees, directors, and receivers of the Apalachicola Land Company. The bill alleges that the Apalachicola company, being the owners of a large tract of land, in 1836 laid out a town upon the tract known as the city of Apalachicola, which then had a considerable population. That the company laid out and surveyed streets and squares. That a map of the town was prepared, and after being duly accepted by the company, was presented to and adopted by the city council. Large sales of land were made with reference to this map which left open the streets leading to the river, and there was as complete a dedication of the land near the river in the direction of the streets as of the streets themselves. In 1837 the company sent an agent to the town to "report upon the situation of the property." This agent, who was also the president of the board of directors of the company and had possession of what purported to be the original map of the town, made an alteration in it by making the lines of the wharf property extend across the streets and filling up the vacant space at the end of the streets by lines of his own creation. The design of this, it was charged, was to revoke the grant previously made to the city, and the alteration was an unauthorized falsification of the muniment by which purchasers held their lots. The company then took possession of the land at the end of these streets and erected wharves, from which it received revenue and profits. The company continued in possession until 1850, when the city of Apalachicola brought ejectment for the land and recovered judgment. The bill further charges that the company is indebted to the city of Apalachicola in the sum of about twenty thousand dollars for the use and possession of the property. That the city would have commenced action at law to recover the same but for the fact that one Andrew S. Garr, who had a claim against the company, filed a bill against the trustees of the company and others, praying that the court would execute the trust instead of the trustees, whereupon a receiver was appointed to take charge of and sell the property of the company, and he had sold the lands of the company and held the proceeds thereof. That the trustees of the company are non-residents, and these proceeds constitute the only property of the trustees or of the company, and upon a distribution thereof

the same would be entirely dissolved, and these funds are the only means for the satisfaction of the city's claim. That although there has been an agreement for the distribution of these proceeds among certain interested parties and a decree founded thereon, this decree should not be given effect to the prejudice of the city's claim. The bill prays an injunction of the distribution of these funds until the city's claim for mesne profits is satisfied. That the altered map be delivered up and canceled, and declared to be false, and its use be enjoined on the trial of any suit by the company. That the court direct an ascertainment of the amount of rents and profits to which complainant is entitled, render a final decree therefor, and order the same to be paid out of the fund in the hands of the receiver or other officer of the court in case Garr or the defendants who have received the same be made liable therefor and a decree pass against them to that effect. A motion for the injunction as prayed was denied by the chancellor and the complainant thereupon appealed.

Thomas Baltzell, for the appellant.

M. D. Papy, for the appellee.

By Court, FORWARD, J. The bill, it will be seen, is filed in this case for the purpose of restraining the use of the map, alleged to have been fraudulently altered, for any purpose whatever, against the city, and for the recovery of mesne profits after judgment in ejectment, and for the recovery of the costs of said suit in ejectment.

The main question is, whether the bill makes out a *prima facie* case—such a case as required the chancellor, on the application for said injunction, in the exercise of legal discretion according to the rules of equity and good conscience and practice of the court, to grant said injunction, or in other words, whether the chancellor erred in refusing to grant said injunction.

The rule of law is, that on the application for an injunction, a chancellor may go into the consideration of the merits as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges: *Rose v. Hamilton*, 1 Desau. 137; and this court, in the case of *Yonge v. McCorkick*, 3 Fla. 369 [63 Am. Dec. 214], held it also to be a rule of practice that, "on a motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing."

It is unnecessary to consider so much of the bill as sets forth the alteration of the map, and asks the restraining of the use of the same, as also the restraining of suits, only so far as the same gives jurisdiction to this court for that purpose, and the consideration of the use that may be made of said map in any recoupment of rents and profits that may be asked. The bill does not contemplate the injunction prayed in this particular until the final hearing of the cause.

In a question of recoupment or set off of value of improvements to the claim for mesne profits, the question of *bona fide* possession may be important, and on that issue, whether the company went into possession by color of this alleged altered map or not may, it is conceived, be attempted to be raised; therefore, the setting of it (the map) aside might be proper for the exercise of equity jurisdiction.

The bill sets forth a recovery in an action of ejectment of the premises in question, and also the possession of the same (obtained by said suit) in the appellant, avers a right to mesne profits in the nature of damages, and alleges reasons why the owner, after recovery of the land, resorts to a bill in equity against the late occupant for an account of the rents and profits.

On the part of the appellant, it is contended that the right of the plaintiff in an action of ejectment is a necessary consequence of a recovery in ejectment, and the judgment in ejectment is conclusive, and that the case at bar is not an exception to the general rule.

In 3 Bla. Com. 205, the commentator, in speaking of recoveries in ejectment and right to action for mesne profits, says: "The judgment in ejectment is conclusive against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff, but if the plaintiff sues for any antecedent profits, the defendant may make a new defense."

The supreme court of Tennessee, in the case of *Nelson v. Allen*, 1 Yerg. 383, say: "A right to land essentially implies a right to the profits accruing from it, since without the latter the former can be of no value."

Again, in *Green v. Biddle*, 8 Wheat. 1, the supreme court of the United States say: "At common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bona fide* or a *mala fide* possessor, is liable to the true owner for all the rents and profits which he has re-

ceived; but the disseisor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages."

In *Benson v. Matsdorf*, 2 Johns. 371, the court say: "It is well settled that the right to mesne profits is a necessary consequence of a recovery in ejectment. See also *Baron v. Abeel*, 3 Johns. 481 [3 Am. Dec. 515]. In the case of *Averett v. Brady*, 20 Ga. 523, the supreme court of Georgia say: "In an action for mesne profits against a trespasser, the rule is quite liberal enough, that if the improvements made on the land increase the profits, it is proper for the jury to take into consideration the improvements and to diminish the profits by them, but not below the value without the improvements."

In 4 Phill. Ev. 315, it is stated that the plaintiff must prove the value of the mesne profits, to be estimated by the amount of the crops taken, or by the fair annual value of the premises."

On the part of the appellee, it is contended that the plaintiff in the court below is not entitled to mesne profits, because the right to the street is only to hold it subject to the public easement, and was not the source of revenue; therefore, the case at bar is an exception to the general rule of recovery in ejectment.

This brings up the inquiry into what are the rights of the city of Apalachicola, and whether this case is an exception. The bill sets forth that prior to the incorporation of the city of Apalachicola, to wit, in 1836, the proprietors of the land dedicated the street of the town, extending then down to the river, to the use of the public; that afterwards, on the second of February, 1838, an act of incorporation was passed by the legislature, and said town incorporated.

Here was a dedication to public uses, which, by operation of law, became vested in the officers of the city as soon as they became incorporated, for the benefit of the citizens: *Pavlet v. Clark*, 9 Cranch, 331; *Cincinnati v. White*, 6 Pet. 431.

According to 2 Hilliard on Real Property, 16, an easement for the public in the land of others is not personal estate, but a real franchise, holden by the commonwealth for the benefit of all the citizens. In the case at bar, the easement was a real franchise holden by the corporation for the benefit of all the citizens. We have nothing to do on this appeal with the question whether an action of ejectment will lie to recover possession of a street. That was determined by the recovery in

ejectment; and by the recovery and judgment, it was determined that the appellees or defendants in that suit were guilty of the trespass and ejectment complained of. This establishes the entire ownership for the use of the inhabitants.

The town, by authority of the legislature granted in the act of incorporation, have given to them the right to regulate, erect, and keep wharves, to appoint wharfingers, etc. The appellees, or rather the company, obstructed their right, took possession of the lands upon which they might have erected and kept wharves, prevented the city from building wharves there, built for themselves thereupon wharves, received rents and profits thereof, and continued to hold the same until they were turned out of possession by ejectment. Now, when the city is seeking damages for the obstruction, they are told that the case of *Rowan v. Portland*, 8 B. Mon. 257, establishes that all the city of Apalachicola could charge for toll, wharfage, or fees, or could collect for rent of wharves built by them, was a sufficient sum to secure a fair reimbursement and remuneration for their costs, and trouble and expense of keeping them up, and as this was paid by the company, that therefore the city have no action for use and occupation. To this our inquiry is now directed. By reference to authorities, it will be seen that trespass will lie at the suit of a corporation who have the freehold or actual possession of the soil of the market-place, against a person who places stalls, tables, etc., there, without their leave: *Norwich v. Swann*, 2 W. Black. 1116; *Northampton v. Ward*, 2 Stra. 1238. A corporation may also have an action on the case for an interruption of a right of way vested in them: Grant on Corporations, 194. Would it be any answer to the former trespass, when damages are asked, to say: We suppose the dedication of the market-place was for the advancement of the interests of the town as a commercial place, and not with a particular view to any profit to be derived from rents and tolls, or otherwise; and although the stalls, tables, etc., were erected without their leave, and while the trespassers hold them they made charges and profit, yet, as the town incurred no expense for this particular object, we think the town must be content with the recovery of the right alone, without damages. Would this be a legal answer in justification of a trespasser? We think not. If, in response to the action admitting the right of action for an interruption of a right of way, it is contended the corporation were bound to keep it uninterrupted, we ask whether it would be an answer for claim

for damages, for said interruption, to say the town has incurred no expense in erecting the building or wharf which interrupted the street, therefore the town must be content with the recovery of the right alone, without damages.

It does not necessarily follow that the erection of wharves at the foot of these streets prevented the egress and ingress of the citizens to the water, for the reason that they may be so constructed as to afford all the privileges granted to the inhabitants, but something more was dedicated; the street was vested in the corporation for the benefit of the citizens.

In the erection of wharves, a new improvement was commenced, and was authorized by the act of incorporation. The corporation then had the right of building wharves, a right to regulate them for the benefit of the citizens, or, they being the owners of the land, for the benefit of the citizens, had the right of renting out the land; the rents and profits would go to the town treasury for the benefit of the citizen, but the company, by taking possession of these lands, without the leave of the corporation, interrupted their franchise and deprived the citizens of the benefit they otherwise would have received from these lands. It is said that the tolls, wharfage, and benefits received by the Apalachicola company, although by usurpation, was a wrong rather against those who paid them than upon the town, and as the town itself had only the right of charging toll to an extent sufficient to secure a fair reimbursement and remuneration for the cost of the wharves and trouble, that therefore the town cannot be entitled to collect, for the benefit of the inhabitants, any profits. This, upon first view, carries with it a great deal of plausibility. But let us examine it. In the first place, there is nothing in the bill to show that the Apalachicola company did not collect more than a fair reimbursement and remuneration, while every presumption is that they erected the wharves and kept them up for profit. There is no doubt the commerce of the town was advanced by their erection, but the question arises, whether, not only the commerce of the town, but the citizens, would not have been more benefited by the exercise of the franchise of the town, which was interrupted by the usurpation of the company. Again, if the citizens had been required to pay more than the town was authorized to ask, they, indeed, were wronged, and we ask, Was and is it not the right and duty of the trustees of the people, i. e., the corporation, to collect the rents and profits of the land held for their benefit,

and which had been wrongfully usurped to their injury? Is it any answer for them to say to the people, Your *cestuis que trust* were wronged, and therefore you, their trustee, have no action for mesne profits for their benefit? Is it certain that the right of charging toll, by the town itself, could not have been carried beyond a fair remuneration and reimbursement for the costs of the wharves and the keeping of them up?

The *Wharf Case*, in 3 Bland, 361, is cited as maintaining that a wharf may be dedicated by the owner to the public use, and no toll can afterwards be imposed upon the use of it but by authority of the legislature. We regret that we have not this volume for examination; not having it, we take the head-note as a suggestion. In the case we are considering, the legislature of our state did give authority to take toll for the use of the people, if the corporation should make that one of the regulations. There is no restriction of the corporation, and if they can collect tolls at all, we see no reason why they have not the discretion to make the wharves profitable, the proceeds of which go into the treasury for the benefit of the people.

If this discretion should be abused, the people have their remedy. The case of *Maysville v. Boon*, 2 J. J. Marsh. 226, was the case of a ferry established by the town on land lying at the foot of a dedicated street. The court say, a ferry is a franchise real; it is a common highway. And whether the general interests or that of the town of Maysville be considered, it would appear more expedient that the citizens of the town, through their appointed organs, should be responsible for the proper management of a ferry at their town, and enjoy the profits resulting from it, than that its control and emoluments should be vested in any one citizen. The court, in this case, did not think the town restricted to a reimbursement and remuneration for the costs of the ferry; on the contrary, thought they could make profits thereon.

In this court, in the case of *Geiger v. Filor*, 8 Fla. 347, the court say: "The power and right of a city to erect a wharf being conceded, it seems to us that the imposition of a toll would and should depend upon a right discretion in the city council."

The case of *Rowan v. Portland*, 8 B. Mon. 257, was decided by a very able court, and so far as it adjudicates the case before the court, is entitled to great weight. That portion of the opinion of the court which is not directly in analogy with the

facts of the case under consideration, can only be looked upon as extrajudicial dicta. In that case, there was no recovery in ejectment. The right of property and possession was sought to be declared. There was no judgment in ejectment, conclusive evidence against the defendants for all profits, etc., as in this case. Had that case been tried at law, and the defendants found guilty of trespass and ejectment, the court might not have concluded that the town must be content with the recovery of the right alone, without damages, or an account. On the contrary, the case of *Trustees of Augusta v. Perkins*, Id. 209, decided at the same term of the court, and which was an action by an incorporated town for mesne profits after a recovery in ejectment, the same court, in speaking of the set-off against their claim for mesne profits, say: "But whether he has such claim or not, he is liable to the trustees for the mesne profits during his occupancy of their property."

It will be seen that this case of *Trustees of Augusta v. Perkins*, 8 B. Mon. 198, was again before the court, and a full statement of the case will be found reported in *Trustees of Augusta v. Perkins*, 3 Id. 437.

In the case of the *City of Savannah v. Steamboat Company of Georgia*, R. M. Charl. 350, Judge Law, in delivering the opinion of the court, says: "The propriety of distinguishing between the corporation, when the legal title of the land is in them, and an individual, does not occur to me. . . . The ground itself is to be held and appropriated to the purposes of the grant."

So in this case, we can see no distinction in the right of action for mesne profits, after recovery in ejectment by the city of Apalachicola under the provisions of her charter, from that of the recovery of an individual.

The appellee says there is no equity in this bill. The plaintiff having recovered in ejectment, his remedy, if any, was by action of trespass at law for mesne profits.

The rule authorizing the owner, after recovery of the land, to resort to a bill in equity against the late occupant for an account of the rents and profits, is laid down as follows: "Where a man has title to the possession of lands, and makes an entry whereby he becomes entitled to damages at law for the time that possession was detained from him, he shall not, after his entry, turn that action at law into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant or some other very particular circum-

stances:" 1 Fonblanque, 14. The particular circumstances excepted in laying down this rule extend to all cases which involve an equity which the plaintiff cannot make available at law: *Drury v. Connor*, 1 Har. & G. 229; *Nelson v. Allen*, 1 Yerg. 373; *Grimes v. Wilson*, 4 Blackf. 331; *Curtis v. Curtis*, 2 Bro. C. C. 622.

In *Curtis v. Curtis*, *supra*, it was held that equity will give relief beyond that which the party could obtain at law, if the recovery of the demand has been unconscientiously obstructed. On recurring to the bill, the complaint charges the fraudulent altering of the map, under which the dedication and the sale of the lots was made. It also charges that the appellees are seeking to make fraudulent use of it, against any remedies of the appellees against them, and prays it may be suppressed, and they restrained from using it. This map, as we have seen, might be unconscientiously used against the appellees on the issue of *mala fide* possession at law for mesne profits, hence the necessity of relief against it. The bill shows a *prima facie* right to the discovery and relief sought respecting this map. That being the case, it is settled that the court of chancery, where the claim is for an account of rents and profits, may finally settle the whole merits of the cause: *Elliott v. Armstrong*, 4 Blackf. 423; *Dormer v. Fortescue*, 3 Atk. 132. The bill further states that the company are non-residents; that there is property of the company in the hands of persons therein named, who are receivers of the court of chancery, and that the company have no other property within the state; that the court of chancery has undertaken the trust which belonged to the company, and as there is nothing to give jurisdiction to a court of law, they are compelled to come into chancery. That the decree under which the receivers are appointed, and the court of chancery, have taken all their property into the registry of the court, was a consent decree, that therefore their recovery in law has been unconscientiously obstructed.

Upon the face of the bill, therefore, there is, we think, a *prima facie* case made out for the jurisdiction of a court of chancery—sufficient, at least, until the answer comes in. It is also contended by the counsel for appellee that the claim of the appellants for mesne profits is barred by the statute of limitations.

The rule is, that where the face of a bill in chancery shows a case barred by the statute of limitations, and no circum-

stances are stated which take the case out of the operation of the act, the defendant may take advantage of it by demurrer, and is not bound to plead or answer: *Rhode Island v. Massachusetts*, 15 Pet. 236. Whether the appellant files his claim for any profits antecedent the demise laid in the declaration of ejectment, the bill does not advise us. The bill is not very clear and expressive as to the time for which mesne profits are claimed. Whether a claim which is a real action, and is a necessary consequence of a recovery in ejectment, and the judgment conclusive, is within the operation of the statute of limitations, we do not undertake to decide, nor can we say the face of the bill shows a case barred by the statute.

There are circumstances stated which are undenied, and which, for the purposes of this application for injunction, make out a *prima facie* case out of the operation of the act.

It is urged that this application for an injunction, if granted, will have the effect of arresting the execution of a decree of the court of chancery. What the provisions of that decree are, the bill does not advise us. It is charged to have been a consent decree, as the bill says "there has been an agreement for the distribution of these proceeds amongst certain parties therein named," etc. In order to arrest the execution of a decree, it must of course be shown that the applicant has a prior right, which he has not lost by laches, and it follows that any one having a right prior to the applicant should not have that right disturbed. There is nothing in the bill to show what the rights of any of the parties to the decree are, unless it is that of Andrew S. Garr. He seems to have been vigilant. Whether he has been paid, or whether there has been any distribution, we are not told. The bill, however, alleges that "the land has been entirely sold under the direction of the receiver, and in whose hands and possession are the notes, bonds, cash, etc., received for and on account of said lands." It would not, we think, be justice on this application to restrain the recovery of those creditors of said company who have been vigilant, and by their diligence substantiated their demands against the company, and are only waiting the collection of assets to receive their pay; but if there is anything in the hands of the receivers over and above such established debts, that would be a proper fund or choses in action to be restrained from passing into the hands of others until the further order of the chancellor.

In consideration of the merits as disclosed in the bill, we

think the court below erred in denying an injunction. The cause is therefore remanded back to the circuit court, with instructions to grant an injunction until the further order of that court, enjoining any surplus money, or transfer of any notes, bonds, choses in action, etc., or proceeds of any notes, bonds, etc., received for and on account of said lands, remaining in the hands of the receiver, after payment of claims of creditors who have established their claim and obtained a decree for the payment of the same.

As to whether attorneys' fees, moneys expended in lawsuits, etc., can and should be allowed in this bill against the late occupant of said premises for meane profits, this court does not now undertake to decide.

STATUTE OF LIMITATIONS, WHETHER MAY BE RAISED BY DEMURRER: *Gebhart v. Adams*, 76 Am. Dec. 702, note 704; *Smith v. Fly*, Id. 109, note 114; *Wilkinson v. Flowers*, 75 Id. 78.

JUDGMENT IN EJECTMENT IS CONCLUSIVE AS TO RIGHT TO MEANE PROFITS during period covered by demise: *Postens v. Postens*, 38 Am. Dec. 752; *Drezel v. Man*, 44 Id. 195.

CHANCERY COURT HAS NO POWER TO REVISE AND CORRECT DECISIONS of circuit court on its chancery side, under the constitution: *Tooley v. Gudley*, 41 Am. Dec. 628.

DEDICATION OF LAND FOR HIGHWAY DOES NOT PASS FEE, but easement or right of use only: *Williams v. New York Cent. R. R. Co.*, 69 Am. Dec. 651.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

LAWSON v. POWELL.

[51 GEORGIA, 681.]

DECLARATIONS, ADMISSIONS, AND PROMISES OF EXECUTOR, made after he is clothed with his fiduciary character, will bind the estate of which he is executor.

ASSUMPSIT by plaintiff against defendant as the executor of Zilpha Tomlin, upon an account due from the testatrix, in her life-time. At the trial, plaintiff offered to prove that plaintiff and defendant had gone to the office of one McKenzie, and requested him to enter some credits upon an account which plaintiff held against Zilpha Tomlin, upon whose estate witness understood the defendant to be the representative, and that defendant had, at that time, said that he would settle the balance with McKenzie, who was plaintiff's attorney. To this testimony, defendant objected, on the ground that the "executor could not bind the estate of his testator by an admission or promise." The objection was sustained, and plaintiff took a nonsuit, with leave to set aside the nonsuit, and reinstate the case. Subsequently, the motion was made and overruled, and this is assigned as error in this case.

John K. Jackson, for the plaintiff.

No appearance for the defendant.

By Court, LUMPKIN, J. Was the court right in rejecting the testimony of Wilson O. Davis, who was examined by commission to prove the admissions and promises of Green B.

Powell, executor of Zilpha Tomlin, deceased, of the indebtedness of his testator to the plaintiff?

In *Sample v. Lipscombe*, 18 Ga. 687, it was held by this court that administrators or executors, plaintiffs in an action, were bound by their acknowledgments in relation to the subject-matter of the suit, and that if the estate they represented was injured by these admissions, they were answerable therefor; but that third persons must be protected in acting upon them. True, the suit in that case was instituted by the administrator; but in principle it can make no difference whether the acknowledgments were made by the plaintiff or defendant. In *Faunce v. Gray*, 21 Pick. 243, the court say and decide that the declarations of an executor or administrator are admissible against him in any suit by or against him in that character. See also *James v. Hackley*, 16 Johns. 277; *Hammon v. Huntley*, 4 Cow. 493; *Forsyth v. Ganson*, 5 Wend. 558 [21 Am. Dec. 241].

It is now received as undisputed law that declarations, admissions, and promises of a trustee, after he is clothed with his fiduciary character, will take a case out of the statute of limitations; and that such acknowledgments are sufficient to establish the original demand against the estate: 1 Greenl. Ev., 10th ed., sec. 176, and the cases the cited in the notes.

JUDGMENT. Whereupon it is considered and adjudged by the court that the judgment of the court below be reversed upon this ground: We think the court erred in rejecting the depositions of Wilson O. Davis as to the admissions and promises of Powell, as executor of Tomlin, and consequently adjudge that the nonsuit be set aside, and the case be reinstated.

ADMISSIONS OF ADMINISTRATOR ARE PROPER EVIDENCE against him for the purpose of charging the assets in his hands belonging to the estate of which he is the administrator: *Floyd v. Wallace*, 31 Ga. 690, citing the principal case; see also, to same point, *Godbee v. Sapp*, 53 Id. 283; *Sample v. Lipscombe*, 18 Id. 678; *Griffin v. Superior Court*, 17 Id. 96.

PROMISE BY ADMINISTRATOR to pay a claim which was not valid as against his intestate's estate does not bind the assets of such estate in his hands: *Shepherd v. Young*, 69 Am. Dec. 242.

POWER OF ADMINISTRATOR TO BIND ESTATE: *Shepherd v. Young*, 69 Am. Dec. 242, and note 243; *May v. May*, 68 Id. 431.

CONTRACTS MADE WITH EXECUTOR or administrator are personal: *Fitzhugh's Adm'r v. Fitzhugh*, 62 Am. Dec. 653, and note 659; *Luscomb v. Ballard*, 66 Id. 374, and note 376.

ADMINISTRATOR'S ACKNOWLEDGMENT OF DEBT barred by statute of limitations: *Moore v. Hillebrand*, 65 Am. Dec. 118, and note 120.

BEALL v. LEVERETT.

[32 GEORGIA, 105.]

THERE IS NO PRESUMPTION THAT NOTE PAYABLE ONE DAY AFTER DATE WAS TRANSFERRED to the holder, before its maturity, by the payee. It will be subject to equities against it unless the holder proves, in an action to recover upon it, that he took it before maturity and without notice.

VERDICT WILL NOT BE DISTURBED BY APPELLATE COURT, when from the evidence the jury might reasonably have arrived at a conclusion that will support the verdict.

ASSUMPSIT. The facts are stated in the opinion.

E. S. Worrill, for the plaintiff in error.

E. H. Beall, for the defendant in error.

By Court, LYON, J. The only question made in this case is, whether the verdict is contrary to law and the evidence.

Counsel for plaintiff in error insists that it is:

1. Because there is no evidence but that the plaintiff, or those under whom he holds, was a *bona fide* holder of the note, without notice of the want of consideration set up by defendant.

This position assumes that the *onus* lies on the defendant to show that the plaintiff took the note after its maturity. Ordinarily, that is, when the note has some time to run from execution to maturity, this is true; but we do not think that principle applies to notes like this, due one day after its date; for the time run is so short that it is not probable that it should be put into circulation before maturity, at least not sufficiently so to raise such a presumption in favor of the holder. Notes given due and payable at the time of their execution, or at one day after date, do not belong to that class of paper intended for negotiation and circulation for commercial purposes, in which all the presumptions are in favor of the holder, in order to protect innocent purchasers and to encourage and foster their circulation; but they are given more as an evidence of indebtedness by the maker to the payee. In all such paper, there is no intention by the maker or expectation on the part of the payee or holder that the note will be paid on the next day when it becomes due and payable. We cannot, therefore, hold that the verdict was contrary to the evidence in this particular. If the plaintiff had shown affirmatively that the note had passed *bona fide* from the payee before it was actually due, and without any notice of the defense, or the purpose for which the note was

given, we are inclined to think, though not positive even as to that, that he would have been protected from this defense.

2. Because there is no evidence but that the payee, Jernigan, fully performed his part of the contract, or offered to do so, and that, therefore, the verdict was against law and the evidence.

To dispose of this position, it is necessary to advert to the facts. Jernigan, the payee, residing in the state of Alabama at the date of the note, professed to be able to cure John R. Leverett, the maker of the note, and the defendant's intestate, of a cancer with which he was afflicted at the time—at least, he offered to do so—and agreed to board the intestate and furnish medicines for that purpose, whilst he was treating the disease; and in consideration of this promise and agreement on the part of Jernigan, the intestate promised to pay Jernigan the sum of two hundred dollars, which was to be paid certainly, whether a cure was effected or not; and the additional sum of two hundred dollars in case a cure was effected; besides this, Leverett was to pay for his board and the medicines furnished, and Jernigan was to attend to Leverett as long as he lived for the two hundred dollars.

It is not doubted but that the note was given upon this consideration; it was given at the time the contract was made, in December, 1848; there were no other dealings between the parties. If the fact that this contract formed the consideration of the note had been denied, the jury would have been fully authorized from the facts, in the absence of all other proof to have so found. But was the note given in liquidation of the sum to be paid certainly, or for that dependent on a cure? The only evidence upon the subject is the declarations of the maker, as testified to by Elias Beall, and that went to the jury as evidence that he, Leverett, had been to Jernigan to be cured of a cancer; that he had given said Jernigan his note for two hundred dollars; that he had paid him some money, and was to pay him more provided he cured him of the cancer. A fair interpretation of this statement is, that although he, Leverett, had given to Jernigan his note for two hundred dollars, on account of this contract, yet he was not to pay him any more money on that account unless Jernigan succeeded in curing him of the cancer. Considering this as a fact—and the jury had a right to so consider, if they so believed—this note was not given for the sum certain, but the sum conditional, and in that view the verdict was not only not

against but with the evidence, as no cure was ever made by Jernigan of the cancer.

We frankly admit that the evidence is not very satisfactory, but we cannot say that the verdict is so much against the evidence as to require us to interfere with the discretion of the court below in refusing a new trial; and as this is the only question in the case, the judgment of the court below must be affirmed.

Judgment affirmed.

PRESUMPTION IS THAT CHECK IS GIVEN ON VALID CONSIDERATION, but this presumption being rebutted, holder must show that he received it without notice and for a valuable consideration: *Fuller v. Hutchings*, 70 Am. Dec. 746.

JANES v. HORTON.

[32 GEORGIA, 245.]

UNLESS NOTICE OR DEMAND BE EXPRESSLY REQUIRED by the terms of an agreement, or by the peculiar nature of the contract, a party who has contracted with another to do a particular thing upon the happening of a certain event is bound, when he knows of the happening of that event, to do the thing contracted, without a demand or notice from the obligee.

WHERE ACT IS TO BE DONE UPON HAPPENING OF CONTINGENCY, and that contingency is the entry of a judgment in an action to which the obligor is a party, his knowledge of the entry of the judgment will be presumed.

ENTRY UPON EXECUTION ARRESTED BY DEFENDANT filing a claim of illegality, made by the sheriff, is evidence of the facts recited therein in an action by such sheriff for the use of others upon the illegality bond.

DEBT. A mortgage *fi. fa.* was duly issued in favor of William G. Howard and John Hentz as administrators of Thomas Howard, deceased, against William Horton, dated June 21, 1845. June 28, 1845, it was levied by plaintiff, who was sheriff, on certain personal property. The defendant Horton filed an affidavit of illegality to the *fi. fa.*, gave plaintiff a forthcoming bond, and the property was released to said Horton's sureties on such bond. Afterwards, the illegality was duly overruled, and the *fi. fa.* was ordered to proceed. The condition of said bond is as follows: "Now, if the said Horton, or his securities for him, shall well and truly deliver to said sheriff said property, if said illegality shall be set aside, then this bond to be void, else to remain in full force and virtue." The sheriff duly advertised the property for sale. Horton and his securities failed to deliver the property to the sheriff as agreed by the

terms of said bond, and this action was commenced by the sheriff, for the use of plaintiffs in the *fi. fa.* against the defendant therein and his sureties on the bond. The presiding judge ruled at the trial that plaintiff must aver and prove a demand of the property, and a failure or refusal to deliver it before he could recover, to which plaintiff excepted; also that Janes could not testify in this case, he being interested in the action as plaintiff, to which plaintiff excepted. The court awarded a nonsuit against the plaintiff. These several rulings of the court are complained of as error for which the judgment ought to be reversed.

Irvin and Butler, and Strozier and Hood, for the plaintiff in error.

W. A. Hawkins, and Warren and Warren, for the defendant in error.

By Court, JENKINS, J. The record in this case presents two exceptions, one of which was taken to the rejection of the depositions of William Janes, sheriff, who is the nominal plaintiff, and whose testimony was offered to prove that the principal obligor did not deliver the negroes in compliance with his bond.

This evidence was rejected, on the ground that the witness was interested in the event of the suit, and therefore incompetent. To the extent of liability for costs, the sheriff was apparently interested, and it does not appear that his usees, for whose benefit the suit was instituted, deposited the costs with the clerk, or did any other act to relieve him from such liability; but in our view of this case (as will hereafter appear), his depositions were not at all material to the case.

This evidence having been rejected, the plaintiff closed his case, and upon defendant's motion, the court below awarded a nonsuit, to which plaintiff's counsel excepted; and this ruling of the court we have now to review. It is not distinctly stated on what grounds this nonsuit was awarded; but from other parts of the record, we arrive at the conclusion that they were these: 1. That the bond was not a statutory but a voluntary bond; 2. That plaintiff had failed to prove a demand for the slaves levied upon, which was incumbent upon him by the common law; 3. That he failed to prove that the defendant did not deliver the slaves in terms of the law.

It is by no means clear that this bond so nearly conforms to the statute as to make it a statutory bond. For the pur-

Irwin and Lester, for the plaintiff in error.

J. R. Brown, for the defendant in error.

By Court, JENKINS, J. There was, in this case, in the court below, a motion for a new trial on several grounds, all of which being overruled, and the motion refused, plaintiff in error excepted. One of these grounds assigns error in the refusal of the court to dismiss the suit, after the evidence on both sides was closed, because it appeared from the proof "that one Keith was prosecuting said action of ejectment, solely upon the demise of one Joseph Smith, for the benefit of said Keith, without having connected himself with the title of said Smith, and without any authority from him to use his name, to oust one in possession of the land, under claim of right and title."

Another ground assigns error in the refusal of the court to charge when so requested, that under such circumstances the plaintiff could not recover.

The question involved in both grounds is the same, and was decided by this court in *Adams v. McDonald*, 29 Ga. 571.

The facts in that case and in this, *quoad* the question under consideration, are identical, and it was there ruled that "to authorize the plaintiff in ejectment to use the name of a third person as lessor, he must show that he has a *bona fide* subsisting claim to the premises, and that there is a connection between his title and that of the party upon whose demise he seeks to recover; or that he has the authority of that person in whom the paramount title is vested, to institute the suit in his name.

The learned judge cites, in support of that ruling, the cases of *Couch v. Turner*, 17 Ga. 489, and *Kinsey v. Sensbough*, Id. 540. The judgment of the court below, in the case at bar, is in conflict with that case, and must therefore be reversed.

Courts should not permit parties to avail themselves of the fictitious character of the action of ejectment to perpetrate injustice to others.

Let the judgment be reversed.

IF LESSOR IN EJECTMENT IS DEAD when the action is brought, plaintiff cannot recover on his demise; if he dies after action is brought, but before trial, plaintiff can only recover cost: *Watson v. Tindal*, 71 Am. Dec. 142.

ATLANTA AND WEST POINT R. R. Co. v. SPEER.

[32 GEORGIA, 550.]

IN DECREETING SPECIFIC PERFORMANCE, a court of equity must have some certain and specific act which ought to be performed by the delinquent party to act upon, and it will decree that it be performed; but it cannot enter a general decree that in future the delinquent party shall perform the acts required of him by his contract. Such a decree would be too general and indefinite.

WHERE WORD IS ACCIDENTALLY OMITTED FROM CONTRACT, but the context clearly and sufficiently indicates the intention of the parties, a court of equity will not reform the instrument.

CLAIMS FOR DAMAGES WILL NOT BE ENFORCED, in equity, if there is no other cause of complaint to bring the case within equity jurisdiction, except the damages inflicted.

BILL in equity. Defendant in error executed a deed to plaintiff in error, the material part of which is sufficiently stated in the opinion. The word "desire" was accidentally left out of the following sentence in said deed: "In addition to the consideration above named, the said company agree to erect and maintain a platform, at some convenient point on said right of way, for the shipment and receipt of such produce and merchandise as the said Speer, his heirs or assigns, may [desire] to ship or receive." Other facts are stated sufficiently in the opinion.

L. E. Bleckley and G. A. Bull, for the plaintiff in error.

Speer and Speer, for the defendant in error.

By Court, **JENKINS, J.** The bill in equity which the plaintiff in error insists should have been dismissed on demurrer in the court below has three objects: 1. To compel specific performance of a contract in the future; 2. To recover damages for past breaches of the same contract; 3. To reform that contract by the insertion of a word alleged to have been omitted by mistake.

The plaintiff in error, a railroad corporation, in consideration of a grant of a right of way through the defendant's premises, contracted to place beside their road, on said premises, a platform convenient for lading and unlading cars, and to take from that platform all produce to be shipped by defendant, and to bring and place on it all freight shipped by or for him to that place from any other point on their road.

To this contract, however, was annexed a condition that defendant should give three days' notice to the agent of the

plaintiff, at the nearest station, of any such freight to be transported. Defendant in error alleges, in his bill, that plaintiffs have, in divers instances, broken this contract, and have given notice, in writing, that they do not intend to comply with it. Certainly, the proof of the contract, and of a declared intention to violate it, acts as a powerful stimulant to any court having jurisdiction.

But to us it appears that there is an intrinsic difficulty in decreeing prospectively a specific performance of this contract.

We are not asked to compel the plaintiffs in error to transport a particular article of freight now being on the platform awaiting transportation. We are asked to decree that they shall, in all future time, transport all freight and deliver it, as required by defendant in error in terms of the contract.

It is evident that any such decree must be as general and as indefinite in its terms as the contract itself. It cannot be specific as to the kind of produce, the quantity, the time of performance; nor can it make a decree which will be satisfied by any specific act of performance. After decree made, the case must be kept open, and if the defendant (in that decree) be contumacious, there must be action of the court to enforce it twenty, perhaps fifty times a year, for all time. Besides, in regard to each alleged violation of the contract, the other party is entitled to a hearing. He may insist that the freight in question, at one time, is not of the description contemplated in the contract; at another, that it is not the property of the party complaining; at still another, that notice had not been given in terms of the contract.

We are satisfied that this is not a contract of which performance can be compelled by one sweeping decree, embracing all time and all instances demanding performance. The party has an adequate remedy at law, and doubtless would be redressed there.

2. There is no foundation for the prayer for pecuniary damages for past violations of the contract. A court of equity would not interfere to enforce a contract, except by specific performance, and that, it has been seen, is not practicable in this case.

3. As regards the relief sought by way of amendment to the bill—the reformation of the contract—we think the intention of the parties sufficiently apparent to be recognized in any court, and that there is no sufficient reason for bringing the party into a court of equity for a reformation of the contract.

Our conclusion is, that the demurrer should have been sustained, and the bill dismissed.

Let the judgment be reversed.

IN ACTIONS FOR SPECIFIC PERFORMANCE, BILL SHOULD SET OUT PARTICULARLY WHAT ACT IS DESIRED TO BE SPECIFICALLY DONE: *Shockley v. Davis*, 63 Am. Dec. 233.

BILL FOR SPECIFIC EXECUTION OF CONTRACT does not lie, where adequate remedy exists at law, particularly if the matter is concerning personal chattels: *Shockley v. Davis*, 63 Am. Dec. 233, note 235.

MADDOX v. STATE.

[32 GEORGIA, 581.]

PUBLIC EXCITEMENT PREVAILING AGAINST ONE ACCUSED OF CRIME, in the county where it was committed, added to other causes insufficient in themselves, ought to turn the scale in favor of a motion for a continuance.

WHEN PRINCIPLES OF JUSTICE REQUIRE POSTPONEMENT OF CRIMINAL TRIAL, it is the duty of the court to see that the trial is not precipitated to the injury of defendant.

WHERE JUROR STATES ON HIS VOIR DIRE THAT HE HAS FIXED OPINION as to the guilt of the accused, he is incompetent to try a criminal case, even though the opinion was formed from hearsay evidence.

INDICTMENT for murder. When the case was called for trial, the accused moved for a continuance, upon grounds which are stated in the opinion. The motion was overruled. In selecting a jury to pass upon the case, a juror avowed on his *voir dire* that he had a fixed opinion as to the guilt of the accused, formed from hearsay evidence. The accused challenged the juror for cause. The court decided the juror competent. Defendant excepted. The jury rendered a verdict of conviction; the prisoner moved for a new trial, which was denied, and he excepted, and now prosecutes this writ of error to reverse the verdict and judgment.

Lofton, solicitor-general, for the defendant in error.

By Court, JENKINS, J. This was a case of indictment for murder, and conviction. The defendant moved the court for a new trial, on numerous grounds, all of which were overruled, and the defendant excepted. We deem it unnecessary to consider more than three of these grounds.

1. It is alleged that the court below erred in refusing to continue the case, upon the showing made by the defendant.

This showing presents two causes for continuance: 1. The recent commission of the homicide charged (less than two months having elapsed between the killing and the trial), and the prevalence of a degree of excitement in the county against the accused, which rendered it unsafe for him to go to trial at that term of the court.

The affidavit of the accused on this subject is very distinct, and he offered to corroborate it by the affidavits of two of his counsel. These latter the court refused to consider, because the proposed affiants resided out of the county of Jones, at the same time holding the accused to the adduction of evidence, other than his own, of the excitement in the public mind.

This latter requisition, however, was subsequently abandoned by the court, and the continuance on this ground refused upon the authority of a decision of this court in the case of *Thompson v. State*, 24 Ga. 297, 303. In that case, this court held that since the passage of the act of 1856, providing additional and thorough tests of the competency of jurors, there was little danger to be apprehended by those charged with crime, from unfriendly excitement in the public mind, and that the existence of such excitement was not, of itself, a sufficient showing for a continuance of a criminal case.

In the case of *Thomas v. State*, 27 Ga. 287, it was ruled "that popular excitement alone is not sufficient to procure the continuance of a cause, except under extraordinary circumstances." We are not prepared to say that the affidavit of the accused in this case shows any extraordinary degree of popular excitement, or any extraordinary circumstances likely to swell that excitement to a height beyond what usually results from homicide. Nor can we say that, had this been the only showing for a continuance, it should have received the favorable consideration of the court.

In the connection in which it was presented, however, it was worthy of consideration. In all cases in which this cause is superadded to others, if the court have a doubt of the sufficiency of those other causes, this one may very properly turn the scale in favor of the motion to continue, even though there be shown no "extraordinary" circumstances. This I understand to be the effect of past rulings on this subject, and I should be very reluctant to see the force of such a showing further diminished.

2. The affidavit for continuance under consideration went much further. It alleged that before he shot deceased he had

- himself been shot, as he then and still believed, by deceased, but that he is unable to prove this, and uninformed as to what the bystanders, who were numerous, know of the circumstances, by reason of his arrest on the day following that of the homicide, his continued confinement in jail ever since, his inability from poverty to employ counsel to prepare his case, and his lack of a friend to perform that service for him, that he believes diligent inquiry would bring to light the person who actually shot him; that the bill of indictment had been found against him at the present term, and that he had, by the charity of others, been provided with counsel only since its commencement.

The court below held that, because the accused had residing in the neighborhood a father and a brother, he might, through their instrumentality, have prepared his case for trial during his confinement. But he swears positively that he had no friend to do this office for him. The existence of the relationship, referred to by the court, does not negative the averment in the affidavit, and the close confinement of the accused, sick and sore from his wounds the while, relieves him from the imputation of laches.

He alleges that he had been sorely wounded before he fired, by whom he does not positively know, but that he then believed and still believes that he was returning the fire of his assailant, and that with further time he will be able to procure proof it. It is objected that he names no absent witness by whom he expects to be able to prove the fact. But this is not an application for a continuance because of the absence of a known witness to prove a particular fact, nor is the absence of a known witness the sole sufficient ground for a continuance. The ground of application is the existence of a fact important to his defense, of which he believes there were witnesses who may be ascertained, but whom he has thus far been unable to ascertain, for reasons clearly stated.

This is his case. Section 175 of the fourteenth division of the penal code provides that "every person against whom a bill of indictment is found, shall be tried at the term of the court the indictment is found, unless the absence of a material witness or witnesses, or the principles of justice, should require the postponement of the trial, and then the court shall allow a postponement," etc. Now, taking this affidavit to be true in fact (and the law does not permit a traverse of it), we think the principles of justice peremptorily required a postponement.

But again, in *Allen v. State*, 10 Ga. 85, this court held that "a party who is conscious of his innocence should not be compelled to incur the expense and labor of procuring testimony until there is a bill found." Under this ruling, had the accused known of a witness by whom he could prove the fact in question, had he failed to subpoena him before bill found, and had he in consequence thereof been unready for trial, his showing would have been good. How much more when he swears that he believes the fact to exist, and that there are witnesses who know it, but that circumstances beyond his control have prevented the investigation and inquiry necessary to their ascertainment.

We commend the zeal and fidelity with which our brethren of the circuit bench resist unnecessary delays in the administration of penal justice, and we know well how often such delays are sought at their hands, but we know that this zeal may become a virtue in excess, and it is our bounden duty, so far as in us lies, to see that even an honest and enlightened zeal in the public service shall not precipitate the trial of a case whilst "the principles of justice require a postponement." Connecting the two grounds of this showing, we are clearly of opinion it should have been allowed.

3. The next ground of error is the ruling that the juror Dorsett was competent. It seems that to the first question propounded to this juror, under the *voir dire*, he failed to answer categorically, but replied: "I have formed and expressed an opinion [as to the guilt or innocence of the prisoner] from hearsay." This was not such an answer, nor in such form, as the statute contemplates. It presented a case of some embarrassment, and it seemed to be conceded on all sides that further interrogation to the same point, before propounding the remaining questions, or disposing of the juror, was proper. The court permitted the counsel for the accused to propound his question: "Is the opinion you have formed and expressed from hearsay a fixed opinion?" He replied: "It is." Here counsel for the accused insisted that the juror should be adjudged incompetent. But the court deemed it proper to apply still another test, and put to the juror this question: "Would or would not your opinion yield to testimony? Do you or not think that you could do justice to the prisoner?" To which he replied: "I think I could, but I would rather get off." The court, after propounding the other statutory questions, and receiving answers, declared the juror competent, and he was put upon the prisoner, and peremptorily challenged.

Was the last test applied by the court, aside from the statute, proper? Here was a juror declaring that he had a fixed opinion which he had expressed, not indeed "from having seen the crime committed, or from having heard any portion of the evidence under oath," as expressed in the statute, but still a fixed opinion. With this state of mind unexplained, the court would not and did not put him upon the prisoner. Supposing this "fixed opinion" to be adverse to the prisoner (as indeed the form of the next question indicates that the court understood it to be), how far does the most favorable result of the next test remove the difficulty?

The doctrine of the law is, that "every man accused of crime is presumed innocent until he is proven guilty." Surely, no just civilian would expunge or qualify this principle. Taking, then, for our guide this principle, what is the state of mind proper to a juror entering upon a trial? Clearly, such that before he could inwardly resolve that the accused was guilty, there must be submitted to him proof of his guilt. In what state of mind does this juror answer to the court's question show him to have been? Such that he firmly believed the prisoner guilty, but might by possibility be convinced that he was innocent.

He should have been without opinion; he had fixed opinion; he should have presumed the accused innocent; he believed him guilty. His mind should have demanded proof of guilt to restrain him from acquitting; it in fact demanded proof of innocence to restrain him from convicting. If one person so minded might be placed upon a jury, twelve might, and there the *onus* would be upon the accused, and not upon the state. It is argued that a fair construction of the statute requires that the juror should not be set aside as incompetent by reason of his answer to this first question, unless the answer disclose that he has "formed and expressed an opinion" from having seen the crime committed, or from having heard a part of the evidence under oath. But let us look into the spirit of the statute. Are its requisitions satisfied by a categorical answer in the negative, to that question? Is he, therefore, declared to be competent? No.

The statute requires that still other questions should be propounded, probing deeper the state of his mind. Let us look again, in this view, to the condition of the juror's mind, when he had answered the questions of the court, and before the second and third statutory questions had been propounded.

He had a "fixed opinion, which might yield to evidence; he thought he could do justice to the prisoner."

With this avowal of a fixed opinion, was it not a mockery to ask him the two next succeeding statutory questions, viz.: "Have you resting on your mind any bias or prejudice for or against the prisoner? Is your mind perfectly impartial between the state and the accused?" If fixed opinion be not a bias of mind, I would like to hear a full satisfactory definition of the word "bias." Lexicographers define it, "A leaning of the mind—a prepossession." But it is said the juror in fact answered both those questions satisfactorily. The record does not disclose that he did so, but we must presume he did, or the court would not have put him upon the prisoner.

Thus answering, charity to the juror requires us to presume that he did not understand the questions he answered. But take a practical test the other way. What sane man, selecting his triers, under a capital charge, would have taken this juror, when put upon him? It was not, then, a question of doubt—of discretion; he was under an imperious necessity to object to the juror. To put such a juror upon a prisoner is, in our judgment, equivalent (though certainly not intended) to denying him one of the peremptory challenges allowed him by law. We do not mean to say, by any means, that if a juror give a general negative answer to the first question, it is the privilege of the accused then to inquire whether or not he has formed and expressed an opinion from hearsay. The statute has prescribed the question intended further to test his competency.

But we do say that a juror, when asked the first question, voluntarily avows an opinion formed, fixed, and expressed, discloses one of those states of the mind, the existence of which the second and third statutory questions were intended to inquire after, and upon the entertainment of which the statute requires "he shall be set aside for cause." We do say any juror who declares first "that he has a fixed opinion as to the guilt or innocence of the accused," and then, "that he has resting on his mind no bias or prejudice for or against the accused, and that his mind is perfectly impartial between the state and the accused," evinces a mental or moral obliquity, either of which unfits him to be a trier, where truth is sought after as a guide in the administration of justice.

4. As this case must be retried, we shall not express any opinion regarding the conformity of the verdict to the law and

the evidence. We may say, however, that it is a very peculiar case. We find in the record no evidence of express malice entertained by the slayer toward the slain, nor yet of any injury done, or provocation given, by the slain toward the slayer. A quarrel had been progressing for hours between other parties, with which it does not appear that either of these had interfered, save to make peace. No act done, no word spoken, by either, would identify him with the one or the other belligerent party; yet just as the latter have proceeded, within a house, from words to a conflict with deadly weapons, the accused standing quietly without the house, looking in another direction, receives a painful gunshot wound; turning quickly to the direction from which the shot came, he sees the deceased coming out of the house (the scene of combat), apparently unarmed, and immediately fires upon him, inflicting a mortal wound. Scarcely has the deceased fallen, when the accused receives another fire, distributing sixty shot, quite of a different kind from the first, over half his person, and falls wounded, but not mortally. Yet no part of the evidence discloses from whom or wherefore the accused received either fire. It is very certain that deceased did not deliver the last, though it is quite probable he may have delivered the first. I believe there is no dispute as to any fact to which I have adverted; at all events, we so understood the evidence. We are strongly impressed that there are important facts (probably susceptible of proof)—part of the *res geste*—not yet developed. Whether they ever will come to light, and if so, what influence they may exert upon the prisoner's fate, hangs in doubt, but the impression stated carries our mind irresistibly back to the question of continuance, and we are constrained to exercise our legal discretion by remanding this case for another trial.

Let the judgment be reversed.

MOTIONS FOR CONTINUANCE ARE LEFT TO GREAT EXTENT TO DISCRETION OF COURT: *Johnson v. State*, 65 Ga. 98. The action of the court in this respect will not be reviewed, except in cases of abuse of discretion: *Oss v. State*, 64 Id. 374; *McFadden v. Commonwealth*, 62 Am. Dec. 308, and note 312. The court must not refuse to allow a juror to be sworn because he states that he has formed an opinion as to the guilt of defendant, if defendant accepts him and he is not challenged by the people: *Van Blaricum v. People*, 68 Id. 316, and note 317.

MONDAY v. STATE.

[32 GEORGIA, 672.]

ONLY STATUTORY QUESTIONS respecting his competency should be propounded to a juror in a criminal case.

JUROR IS INCOMPETENT TO TRY CASE INVOLVING CAPITAL PUNISHMENT if he has conscientious scruples against the infliction of the death penalty.

DECLARATIONS OF PERSON ON WHOM ASSAULT WAS MADE, uttered at or immediately after the assault, are admissible as parts of the *res gestæ* in a criminal case.

ASSAULT WITH INTENT TO MURDER may be committed without using a weapon that might be likely to produce death, although such intention is usually manifested by the use of a deadly weapon.

IN INSTRUCTING JURY, IT IS PROPER FOR COURT TO DIRECT THEM to determine the case by the evidence, and to disregard all other considerations.

NEW TRIAL MUST BE ALLOWED when a party discovers material evidence during the trial of a criminal case, and the court will not continue or suspend the cause to enable the party to obtain such testimony.

INDICTMENT for an assault with intent to murder. Pending the organization of the jury a juror was asked the questions prescribed by the statute, and was found competent to try the cause. Counsel for the prisoner proposed to ask him if he had not conversed with the prosecutor about this case, and expressed to him an opinion against the prisoner, and if he did not have a fixed opinion against the prisoner. The court refused to permit the question, holding that no question could be propounded to the juror except those prescribed by the statute; that if the prisoner desired to show that the juror was incompetent, he must do so by some other witness. The evidence, among other things, showed that the prisoner had choked the prosecutor severely; so much so that he could scarcely get up from the ground; his throat was skinned on both sides of his neck by the prisoner's finger-nails, and he was otherwise badly hurt and much exhausted. His cries attracted other persons, among them John C. Beard, who testified at the trial that as he came up to where the prosecutor was, some one ran off; that he did not see who it was, because it was dark; that he asked the prosecutor what was the matter, to which he stated that defendant was trying to choke him to death. This testimony was objected to, but the objection was overruled. After the testimony was all in, but before the case was submitted to the jury, the prisoner discovered that a witness, who was not present, but who would be present shortly, would testify to facts material to his defense, and asked the court to suspend the trial until his arrival, which the court refused to do. The

other facts are sufficiently stated in the opinion. The jury found the defendant guilty. A motion for a new trial was overruled. The refusal of the court to arrest the judgment and grant a new trial are complained of as errors.

J. J. Scarborough, and Warren and Warren, for the plaintiff in error.

W. E. Smith, solicitor-general (represented by *Strosier*), for the defendant in error.

By Court, LYON, J. There was no error in the refusal of the court to allow the juror, on trial for competency, to be asked whether he had not talked with the prosecutor, etc. The only question to be propounded to the juror are those prescribed by the Georgia statute of 1856: *King v. State*, 21 Ga. 220; *Pines State*, Id. 236.

2. The juror having been asked, and answered that he had conscientious scruples as to capital punishment, without objection it was competent for the court to discharge him for incompetency under the act of 1856, notwithstanding the objection of counsel for prisoner.

3. It was competent for the declarations of Bass, the prosecutor, made so immediately after the contest between himself and prisoner, as testified to by the witness Beard, to go to the jury, as part of the *res gestæ*, to illustrate the impression on the mind of the prosecutor at the time of the nature of the attack made on him by the accused.

4. We subscribe fully to the opinion of the court below, that it is the right of any white man to arrest any slave on the public highway if he has a reasonable suspicion that the slave has in possession stolen property. Such a principle is necessary to the proper discipline, government, and protection of that species of property, and we think there was an abundance of evidence in this case to justify the suspicion of the prosecutor, and to justify him in an arrest of the negro under the circumstances, and the resistance of the negro was unwarrantable upon any pretext whatever.

5. We agree, too, with the court, that while an assault with intent to murder is usually manifested by the use of a deadly weapon, the employment of which is ordinarily calculated to produce death, still an assault with intent to murder might be committed without the use of a weapon that would be likely to produce death.

6. The court also did right to exclude from his charge all allusion to the irrepressible conflict, and a dissertation on the relative rights of the negro to that of a white man, but in lieu thereof to tell the jury simply, as he did, to disregard all outside considerations, and to determine the case by the proof alone.

We do not think that the verdict was against the charge of the court. The defense relied on was, that the negro with whom Bass had the conflict was not the accused, but some other; that Bass was mistaken; that he was deceived by the light or some other cause; that the accused was not there, etc., and much negro testimony was offered in support of this position. The evidence of Mrs. Barfield in rebuttal to all this testimony, to wit, "that she saw the accused on the morning of the conflict, and before the time they carried him to the jail, passing her house going home; he was at the corner of the public square, and that after he passed some time, there passed some dogs and gentlemen, going the same direction he was"—if true, was corroborative of the testimony of the prosecutor, who could not, consequently, have been mistaken.

The testimony of the absent witness, James W. Ragan, "that the dogs did not run on the track of the accused," as testified to by Mrs. Barfield, was material to the defense in overcoming the effect of the testimony of Mrs. Barfield, in that respect at least. The verdict of the jury may have turned entirely on the evidence of Mrs. Barfield. We do not say that it should, but it was testimony that the defendant had a right to have before the jury. What effect it would have had upon the verdict, if any, we cannot say. That was for the jury to consider; but it was legitimate evidence for them, and after it was discovered by the counsel, under the circumstances, we think the court ought either, in his discretion, to have suspended the trial long enough to procure the testimony, or have continued the trial to another term, upon the application, to enable the defendant to obtain the benefit, or supposed benefit, of the witness's testimony, and in not doing either the one or the other, we think the court committed error; and this is all the error that we find in this record.

Let the judgment be reversed.

ONLY STATUTORY QUESTIONS SHOULD BE PROPOUNDED TO JUROR on his trial for competency to try a case, by the defendant, but this does not preclude the triers from interrogating the juror, nor does it preclude the court *ex sponte* from further interrogating him. The defendant may, however, prove

the incompetency of the juror by other evidence: *Simmons v. State*, 73 Ga. 612, and *Johnson v. State*, 65 Id. 99, citing the principal case.

WHEN ACTING STRICTLY AS TRIER, there is no doubt that the judge may decline to have a juror further examined as to his competency, and may look alone to the *alleged* evidence that is adduced: *Cox v. State*, 64 Id. 404, citing the principal case and other authorities.

DECLARATIONS OF PERSON INJURED are not evidence to show the manner in which the injury occurred: *State v. Davidson*, 73 Am. Dec. 312.

EVIDENCE ADMISSIBLE AS PART OF RES GESTÆ: *State v. Davidson*, 73 Am. Dec. 312, note 315.

DECLARATIONS OF PARTY THAT DEFENDANT ROBBED HIM, made immediately after the occurrence, are not admissible to prove the *corpus delicti*: *State v. Davidson*, 73 Am. Dec. 312.

PART OF RES GESTÆ IS WHAT PERSON ASSAULTED SAID at the moment of restoration to sensibility, after being assaulted, and such statements are admissible in evidence against the person who committed the assault: *Johnson v. State*, 65 Ga. 99, citing the principal case. See also, to the same point, *Stevenson v. State*, 69 Id. 72.

DECLARATIONS ADMISSIBLE AS PART OF RES GESTÆ: *Frank v. Cox*, 61 Am. Dec. 141, and note 146.

DECLARATIONS, ADMISSIBILITY OF, GENERALLY, DISCUSSED: *Printup v. Mitchell*, 63 Am. Dec. 258.

AS EVIDENCE: *Printup v. Mitchell*, 63 Am. Dec. 258, and note 255.

THAT DEFENDANT WAS CONFINED in jail is no legal excuse for want of preparation for trial: *Long v. State*, 38 Ga. 505.

HAYS v. McFARLAN.

[32 GEORGIA, 699.]

NOTE IS BASED UPON GOOD CONSIDERATION, and is valid and recoverable, if it is given to the mother of a bastard child by its reputed father, with the intent of doing something for her, and to prevent her from instituting a proceeding of bastardy against him under the statute.

ASSUMPSIT. This action was brought by John W. Hays, administrator of Mrs. M. A. McKee, deceased (a widow), to recover one thousand dollars, upon two promissory notes. The facts are sufficiently stated in the opinion.

Johnson and Sloan, for the plaintiff in error.

Ingram and Russell, for the defendant in error.

By Court, LYON J. The objections to this judgment are to the admissibility of the evidence, the charge of the court, and the verdict of the jury, and all of them may be resolved into one, that is, whether the consideration of the note, the subject-matter of the suit, is good and sufficient in law? Mrs. McKee, the plaintiff's intestate, was pregnant with a bastard child, of

which the defendant was the reputed father, and her friends applied to him to know what he would do for her, and that he must do something before she left for the state of Louisiana, or she would swear the child to him; in other words, that she would institute a proceeding against him in bastardy to compel his support of the child, etc. To avoid this public exposition, the defendant being a married man, and to do something for the mother, he gave this note. That is the consideration. Was it sufficient to support the promise? It is urged by the defendant that it is not, because, as they assert, the note was given to suppress a public prosecution for the offense of bastardy, and that it is void, being against public policy, that is, that it is the policy of the public, by a prosecution and public exposure of these offenders against law, to make an example of them to deter others from like vice and immorality. If the bastardy act had this intention, or that was the policy of this law, under which the prosecution in this case was threatened, there would be great reason in the position of counsel; but such is not the intention or policy of the act, or the purpose for prosecution under it. The sole object of the act is to compel a support and education of a bastard child by its reputed father, and also "the expenses of lying-in with such child, boarding, maintenance, and nursing, while the mother of such child is confined by reason thereof." The law does not compel or require the mother to make the prosecution, or any one else; but the mother may voluntarily give the bond herself for these expenses and the maintenance and education of the child, or if she is able to do so herself, and there is no probability of the child becoming a charge on the county, there is no necessity for such bond, nor will it in that case be required. The whole object of a prosecution and of the act, so far as the putative father is concerned, is to compel him to do what it is his natural and legal duty to do, that is, to support, educate, and maintain the child, and to pay the expenses attendant on the mother's confinement. The public law which these parties were guilty of violating was that of fornication and adulteration, and for this there was no prosecution begun or threatened. The note was given to enable the mother to do that which he otherwise would have been compelled to do, and was, therefore, given upon a sufficient and valid consideration. That the defendant was induced to give the note from fear of exposure, from the shame and infamy that might have attached

to him in consequence, or from a fear of its effects upon his domestic peace and happiness, as well as a sense of justice to render some compensation for the deep and for ever-abiding injury that he had inflicted upon the mother, does not lessen the merit of the note or its validity, but greatly increases it.

It is unnecessary to prolong a discussion of this question, as it is no longer an open one, having been practically decided in this court: *Hargrove v. Freeman*, 12 Ga. 342, in which this court says: "Such a contract is not against good policy or good morals, nor against law, but in conformity with its express provisions, and in the judgment of this court, ought to be enforced. If the defendant's testator, by this arrangement, relieved himself of all statutory liability in which he was in imminent danger, for the child had already been sworn to him, the paternity of which he never disputed, if he was by this means acquitted from a public prosecution, exposure, and disgrace, to say nothing of the trouble, loss of time, and pecuniary expense necessarily incidental to such a proceeding, who shall say that these considerations were not amply sufficient to bind him for the amount which he himself, in view, no doubt, of all these things, as well of his natural obligation to provide for his offspring, freely and understandingly elected to pay?

"The fine imposed by the code [act] for bastardy, it is true, is only seven hundred dollars, but when the reputed father prefers to avoid a public arraignment and trial, and adjust the matter with the mother himself, courts will not undertake to measure the consideration, nor to circumscribe by any definite or prescribed bounds." It was again decided in *Davis v. Moody*, 15 Ga. 181. The same doctrine is maintained and enforced by the supreme court of Alabama, under a bastardy very similar to ours: *Robinson v. Crenshaw*, 2 Stew. & P. 278; see also *Ashburne v. Gibson*, 9 Port. 549. It will not do for the defendant to say now that there is no proof that he is the father of the child, for when he was called upon by the mother, brother, and friend to do something for the mother, he never denied that he was the father, and his giving the note is an admission by himself that he was the father of the child.

Let the judgment be reversed.

THE PRINCIPAL CASE IS CITED IN *Jackson v. Baly*, 33 Ga. 516, which approves the doctrine of this case. See also *Hargrove v. Freeman*, 12 Id. 342; *Davis v. Moody*, 15 Id. 75, to the same point.

HARRIS v. MULLINS.

[32 GEORGIA, 704.]

IT IS FALSE REPRESENTATION if a vendor exhibits a mule to a proposed vendee, and at that time represents the animal sound, if he knows to the contrary, even though the vendor afterwards says to such vendee: "The animal will be sold in a short time at auction, and you will then have a chance to buy him;" and about an hour subsequently the mule is offered for sale at auction, and the proposed vendee purchases the mule upon the prior representations of the seller. The fact that at the auction it was stated that the vendor did not warrant or guarantee the animal in any particular does not alter the rule.

ACTION on the case. The facts are sufficiently stated in the opinion.

Johnson and Sloan, for the plaintiff in error.

Ingram and Russell, for the defendant in error.

By Court, LYON, J. This was an action brought by the plaintiff, Parmelia Mullins, against Richard Harris, for the recovery of the sum of one hundred and twenty dollars, the amount paid by her to him for a certain mule that Harris falsely and fraudulently represented to be sound and all right, when, in fact, the mule was not sound, but was, at the time, afflicted with blind staggers, and had been for a long time before, which defendant knew at the time of his sale and representation; and that the mule died subsequently, and on the same day, of the disease.

On the trial, it appeared from the evidence that Mrs. Mullins sent her son to Columbus to buy a mule, and while there, Harris showed him this mule, and tried to sell it to him at private sale at the price of one hundred and fifty dollars, when Harris told him that the mule was a good mule and would suit his mother, was all right and perfectly sound as far as he knew. The purchase was not then made, when Harris told him that the mule would be sold at auction, when he could have a chance to buy him. In a very short while after this interview, in less than an hour, the mule was put up at auction, when the auctioneer and Harris both announced that no warranty or guaranty of the mule was made or intended; that the purchaser must take the mule at his own risk; that there was to be no lawsuits or after-claps; all that he warranted was, that the animal "was a mule, and had hair on." After these statements, the mule was sold at auction, and bid in by young Mullins at one hundred and twenty dollars. It further

appeared that the mule formerly belonged to Judge Crawford, and while in his possession had an attack of blind staggers; that Judge Crawford immediately traded the mule to Harris, telling him, at the same time, of the fact that the mule had blind staggers, and that he traded her off on that account. After the purchase by Mullins, the mule died the same day, and before he got her out of the city of Columbus, where she was sold, but from what disease it did not appear.

Young Mullins further testified, that he purchased the mule on the faith of the representation made by Harris, before the sale, as to her soundness, and but for them he would not have made the purchase. On these facts, the court charged the jury: "That although Harris & Ellis (the auctioneers), when the mule was put up at auction, stated to the bidders that they would not warrant or guarantee her in any particular, and that the purchaser purchased her at his own risk, yet, if the jury further believed that about an hour prior to the sale at auction, Harris represented the mule to Mullins to be sound and all right as far as he knew, and Mullins acted on this representation in bidding for the mule, and that the mule was not then sound, and Harris knew it, the plaintiff was entitled to recover."

The verdict of the jury was for the plaintiff. Was the charge right? It is insisted by counsel for Harris that it is not: 1. Because, that as Mullins did not act upon the representations at the time they were made, by purchasing the mule at the time and at the price then offered, but at the auction, and after the treaty for purchase at private sale was at an end, he purchased then subject to the terms and conditions of the auction sale, and that the contract is to be judged by what then transpired, and not by what occurred previously in a different negotiation, and for a different price; and 2. Because the charge did not confine the liability of defendant for the death of the mule to the disease with which the mule was afflicted before the sale, or to a disease that the mule had, in the knowledge of the defendant, at the time of the sale.

We do not think the first position a sound one on the facts. The defendant Harris connected the treaty at private with the auction sale himself, for when Mullins had failed to buy at private sale, Harris said "it was all right; that the mule was soon to be put up at auction to the highest bidder, and then he could take a chance." Now, it appears from this statement that Harris intended that his representations

should operate upon Mullins in bidding at auction for the mule, and it certainly did have that effect, if his testimony is to be believed. But whether the statement was made for the purpose of influencing Mullins in his bids at auction or not, or whether the negotiation for purchase at private sale and the purchase at auction was a continuous and connected transaction, or separate and independent, it was a representation to Mullins that induced him to act, and if it was false, and Harris knew it to be, as he clearly did, it was a fraud. The fact that he refused to warrant or guarantee the mule when put up at auction, and said that the purchaser took the mule at his own risk, that there was to be no lawsuits or after-claps, cannot protect him from the consequences of his fraudulent representations privately made to the purchaser, that induced him to buy at that sale. If he did not wish to be charged with the consequences of such statement, he should have withdrawn them; the purchaser would then have acted upon them at his peril. We cannot see how this case differs from a common case of deceit and misrepresentation. *Hopkins v. Tanqueray*, 26 Eng. L. & Eq. 254, was a case very much like this, being an action for falsely and fraudulently representing and warranting a horse to be sound when it was not so known to be by the defendant. There was no evidence of fraud, but the facts were, that the defendant, having sent a horse to Tattersall's to be sold by auction, went into the stable the day before the auction, and there saw the plaintiff, whom he knew, examining the horse's legs, upon which the defendant said: "You have nothing to look for, I assure you, he is perfectly sound in every respect;" to this plaintiff replied: "If you say so, I am satisfied;" and he desisted from the examination. On the next day the horse was put up at auction for sale without a warranty, and the plaintiff purchased him at two hundred and eighty guineas, having, as he stated, made up his mind to buy the horse, relying on the defendant's positive assurance that he was sound. The horse turned out subsequently to be unsound. The court held that there was no evidence from which a jury could infer a warranty, that what was said before the sale amounted only to a representation, and not to a warranty, and that the defendant could not be liable to a mere representation, although contrary to the fact, unless it was fraudulently made. The defendant's representation in this case was fraudulently made; and in that, this case differs from *Hopkins v. Tanqueray*, 26

Eng. L. & Eq. 254. It follows that the defendant Harris is liable to the plaintiff for all damage sustained by the plaintiff in consequence of this fraudulent representation, if the mule died of the disease that the defendant knew it had at or previous to the sale, or of a disease that was the consequence of that.

This is the second objection urged to the charge of the court. There was no evidence of what disease the mule died, whether of blind staggers, or what. Nor was there any evidence of the nature and character of that disease; that is, whether it is a disease which, when it once attacks an animal, it makes a permanent lodgment in its system, or is temporary in its nature, and a recovery from an attack complete, so that the mule, like this, once having the disease, is or would be no more subject to a renewal of the attack than one never afflicted with it. So far as the evidence goes, the mule at the sale may have been perfectly sound; it appeared to be so, and have died from some other disease not at all connected with blind staggers, or resulting from it. If this were so, the defendant was not liable. The *onus* was on the plaintiff to make out the case affirmatively, and the defendant could not be held liable for the death of the mule, unless the mule died of the disease that the defendant said he had at or previously to the sale. It does not follow because the mule once had the blind staggers it continued to have it to its death, and that its death was the result of that disease. It may be so, and it may be that this is the nature of that disease; but this court does not know it to be so, nor does the evidence authorize that belief. The charge excluded the defendant from the benefit of this principle, and in that only we think it to be erroneous.

Let the judgment be reversed.

CASES
IN THE
SUPREME COURT

77

ILLINOIS.

CRABTREE v. HAGENBAUGH.

[26 ILLINOIS, 233.]

IMPEACHING WITNESS MAY BE ASKED IF HE IS ACQUAINTED WITH GENERAL REPUTATION for truth and veracity of the party sought to be impeached; and it is erroneous to refuse to permit him to answer such question, unless he first states that he has heard a majority of all his neighbors speak of his character for truth and veracity.

ACTION LIES UPON PARTIAL BREACH OF CONTRACT, THOUGH TIME LIMITED FOR ENTIRE PERFORMANCE HAS NOT ELAPSED; but if such an action be brought and a recovery had, it will be limited to the damages sustained at the time of instituting the action, and will constitute a bar to any further recovery for a breach of this part of the agreement.

CONTRACTS MUST RECEIVE REASONABLE INTERPRETATION, according to the intention of the parties, at the time of executing them, if that intention can be ascertained from their language.

JURY SHOULD NOT BE DIRECTED TO REJECT ALTOGETHER EVIDENCE OF WITNESS, if he has testified willfully false as to any fact. Such an instruction is too broad. If he so testifies to a material fact, and there is no circumstance in the case tending to corroborate his evidence, the jury have the right to reject all of his evidence as unworthy of credit; but they should not reject such portions of it as may be corroborated by other unobjectionable evidence in the cause.

WITNESS WHO WILLFULLY CONTRADICTS HIMSELF IN MATERIAL PART OF HIS TESTIMONY, for the purpose of concealing the truth, is unworthy of belief, except so far only as he is supported by other evidence in the case; but if a contradiction occurs through inadvertence, or in reference to some matter immaterial to the issue, such a contradiction will not of itself render his evidence unworthy of credit.

ASSUMPSIT to recover damages for breach of contract. The facts appear from the opinion.

A. Green, for the appellant.

C. H. Constable and John P. Usher, for the appellee.

By Court, WALKER, J. On the trial below, witnesses were asked "if they were acquainted with the general reputation of Albin for truth and veracity among his neighbors, and those with whom he associated." The impeaching witnesses had stated that they were acquainted with witness Albin, before this question was propounded. The court refused to permit the witnesses to answer the question, unless they first stated that they had heard a majority of all his neighbors speak of his character for truth and veracity. The question, as asked, conforms to the rule laid down by writers on evidence, and is free from all objection. It is also the rule adopted by this court: *Frye v. Bank of Illinois*, 11 Ill. 367; *Crabtree v. Kile*, 21 Id. 180. The court below erred in not permitting the witnesses to answer the question. Had they answered in the affirmative, then the question might have been asked whether that reputation was good or bad, and when answered whether, judging from that reputation, they could believe the witness they were called to impeach, under oath. It would then be for the opposite party, by cross-examination, to ascertain the extent of the information of the impeaching witnesses, and their means of knowledge.

The next question is, whether the plaintiff had the right to institute his suit, when a breach of contract had occurred, or whether he was bound to wait until the expiration of the time limited for its entire performance. The doctrine is well settled that when a breach of contract has occurred, an action accrues. After a breach, the other party may abandon the contract, and sustain an action for compensation in damages, or he may, if he choose, waive the breach, and insist upon the fulfillment of its other parts. When the party has a specified time within which to perform an act, the other party of course has no right to recover until after the time has expired. After the time has elapsed and the act has not been done, he may sue and recover for a non-performance, notwithstanding other things by the terms of the agreement remain to be performed, unless they in their nature are incapable of separation.

In this case, defendant in error, it appears, leased a pasture to plaintiff in error, and agreed to fence it by the first of the following June. If he failed within that time to fence the pasture according to his agreement, he undoubtedly became

liable for all damages resulting to the plaintiff by such breach of the contract. The agreement to perform this part of the contract was an act which seems to have been independent of other portions of the agreement. The fencing of the pasture was a complete act of itself. It was not an inseparable part of another act, and no necessity is perceived why he should be required to wait until the time for the performance of the last act specified in the agreement had elapsed. If, however, he should recover for the breach of this portion of the agreement before the end of the time, his recovery would be limited to the damages sustained at the time of instituting his suit, and it would constitute a bar to any further recovery for a breach of this part of the agreement. The same may be said of the agreement to furnish sufficient water for the cattle that should be put into the inclosure. It is, however, insisted that this part of the contract is too indefinite to authorize a recovery. This, like all other agreements, must receive a reasonable interpretation, according to the intention of the parties, at the time of executing it, if that intention can be ascertained from the language they have employed for that purpose. It does not appear that any definite number of cattle were agreed upon or spoken of by the parties, at the time the agreement was made, for which defendant was to supply water, or that were to be placed upon the pasture. But as the inclosure was leased for the purpose of pasturing cattle, the presumption is that each party understood that a greater number would not be placed upon it than it would reasonably support, and that the defendant was only to supply water sufficient for that number. The presumption is, that neither party expected the pasture to be surcharged, or that defendant would have the right to refuse to furnish water for a smaller number than the pasture would reasonably sustain. And if plaintiff placed upon it a larger number, it would give him no right to require defendant to supply a greater quantity of water, nor would it release him from furnishing the necessary supply for a reasonable and proper number, for the support of which the pasture was adequate. If defendant failed to perform this part of his agreement, he must be held liable for all proximate damages resulting from its breach.

The sixth instruction announced as a rule, that if the witness testified willfully false as to any fact, that the jury should altogether reject his evidence. This instruction, as given, is too broad. If he had so testified to a material fact, and there

were no circumstance in the case tending to corroborate his evidence, then the jury would have the right to reject all of his evidence as unworthy of credit; but they should not reject such portions as might be corroborated by other unobjectionable evidence in the cause. They are the judges of the weight to be given to such evidence, and it is their duty to determine whether it is supported by other testimony, and if so, to adopt and give it such weight as it deserves, otherwise to reject it. The same instruction is too broad in directing the jury that they should reject the evidence of a witness who makes contradictory statements on the stand. When the witness contradicts himself in a material part of his evidence, and should do so willfully and for the purpose of concealing the truth, he would be unworthy of belief, except so far only as he might be supported by other evidence in the case. But if a contradiction should occur through inadvertence, or in reference to some matter immaterial to the issue, such a contradiction should not of itself render his evidence unworthy of credit.

The judgment of the court below is reversed, and the cause is remanded.

Judgment reversed.

IMPEACHING WITNESS MAY BE ASKED IF HE KNOWS GENERAL REPUTATION OF PARTY SOUGHT TO BE IMPEACHED: See *Gilliam v. State*, 73 Am. Dec. 161, note 162, where other cases are collected; see also note to *Allen v. State*, Id. 772, where this subject is discussed at length.

CONTRACTS MUST RECEIVE REASONABLE INTERPRETATION ACCORDING TO INTENTION of the parties, to be derived from the language therein employed: See *Abbott v. Gatch*, 71 Am. Dec. 635, note 644, where other cases are collected; *Streeter v. Streeter*, 43 Ill. 161; *Walker v. Tucker*, 70 Id. 532; *Fitzgerald v. Staples*, 88 Id. 236, all citing the principal case.

JURY MUST JUDGE OF CREDIT AND EFFECT OF WITNESS'S TESTIMONY: *Fleming v. Marine Ins. Co.*, 33 Am. Dec. 33.

PARTY SUING FOR BREACH OF INDEPENDENT PORTION OF CONTRACT MAY RECOVER, but his recovery will be limited to the damages sustained at the time the suit was commenced: *Hamlin v. Race*, 78 Ill. 425; *Jones v. Duntun*, 7 Ill. App. 583, both citing the principal case.

THE PRINCIPAL CASE IS CITED to these points in the following cases: An instruction that "if the jury believe from the evidence that any witness has sworn willfully, knowingly, and falsely to any material point, they are warranted in entirely discrediting his whole testimony," should be qualified by adding the words, "unless corroborated:" *Blanchard v. Pratt*, 37 Ill. 246; *Chicago & A. R. R. Co. v. Buttolf*, 66 Id. 348; *Peak v. People*, 76 Id. 294. A jury may disregard the evidence of a witness who has been successfully impeached, unless he is corroborated by other evidence which has not been impeached: *Miller v. People*, 39 Id. 463; *Huddle v. Martin*, 54 Id. 260. If a witness has willfully sworn falsely, the jury have the right to reject his entire testimony: *Howard v. McDonald*, 46 Id. 124.

ÆTNA INSURANCE COMPANY v. ALTON CITY BANK.

[25 ILLINOIS, 243.]

BANK RECEIVING FOR COLLECTION BILL OR NOTE WHICH HAS TO BE TRANSMITTED TO ANOTHER PLACE to be collected, discharges its duty by sending it in due season to a competent reliable agent, with proper instructions for its collection.

ACTION on the case. The facts are stated in the opinion.

H. L. Baker, for the plaintiff in error.

Levi Davis, for the defendant in error.

By Court, WALKER, J. In this case, it is agreed that defendant received the bill in controversy for collection in the usual and regular course of banking business. It is further agreed, that when a bank so receives a bill or note, on a drawee or maker residing at a place different from that of the bank, it is usual and customary for the bank to transmit the same to a responsible correspondent, at the place of the residence of the drawee or maker, for collection; that in this case the defendant did so transmit it to their correspondents, who were responsible bankers at the residence of the drawees; that they presented the bill to the drawees for acceptance, on the twenty-ninth of April, 1858, which was refused, but they failed and neglected to have it protested for non-acceptance. Subsequently, however, on the twelfth of May following, it was presented for payment, which was likewise refused, when it was protested for non-payment. Upon this agreed state of facts, the court below rendered judgment in favor of the defendant, and the plaintiff prosecutes this writ of error to reverse that judgment.

This presents the question whether the bank, receiving such paper for collection, is bound for the acts of their correspondents, and are responsible for their negligence. Or whether their undertaking requires anything more than that they should use reasonable care and prudence in the selection of a responsible correspondent to whom it shall be intrusted. That a bank receiving such paper for that purpose, in the usual course of business, is bound to use ordinary and reasonable care in selecting an agent competent and responsible, there is no doubt. And a want of such precaution would clearly render them liable for consequent loss. It does not appear that there was any agreement on the part of the bank to become liable, at all events, for any loss that might occur from

the acts of their correspondents, and the law has imposed no such liability.

Upon an examination of the adjudged cases, it will be found that entire harmony upon this question does not prevail. In the case of *Mechanics' Bank v. Earp*, 4 Rawle, 384, it was held that a bank in which bills had been deposited, having only received them for transmission to their agents for collection, at the place of the residence of the drawees, with the instructions of the depositors, was not liable for the failure of the bank, to whom the bills were transmitted, to collect the money. In that case, the court refers to the cases of *Lawrence v. Stonington Bank*, 6 Conn. 528, and *Bank of Washington v. Triplett*, 1 Pet. 25, and *Jackson v. Union Bank*, 6 Har. & J. 148, as sustaining the rule announced.

Again, in the case of *Bank of Orleans v. Smith*, 3 Hill (N. Y.), 560, the court held that when a bill is left with a bank for collection, and they transmit it in due season to a competent agent at the place of the residence of the drawee with the necessary directions, that they thereby fully discharge their duty, and incur no further liability. In support of the rule, the court refers to the cases of *East Haddam Bank v. Scovill*, 12 Conn. 304, and *Fabens v. Mercantile Bank*, 23 Pick. 330 [34 Am. Dec. 59]. The court also refer to and approve of the case of *Allen v. Merchants' Bank of N. Y.*, 15 Wend. 482, where the same doctrine is announced. And we find, on an examination of these cases, they fully sustain the rule announced by this case.

It is true that the case of *Allen v. Merchants' Bank*, 22 Wend. 215 [34 Am. Dec. 289], decided by the court of errors, announces a different rule, and reverses the decision of the supreme court. In that case, the decision was by a divided court, the chancellor delivering a dissenting opinion. This last case extends the rule, so that a bank receiving commercial paper for collection is liable for loss resulting from neglect, to banks receiving such paper for transmission, where loss occurs by neglect of the agent to whom it is transmitted, and makes no distinction in the two classes of cases. Where a bank receives a bill or note for collection against a drawee or maker, resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect. But when received for transmission, it has fully discharged its duty by sending the instrument in due season to a competent reliable agent, with proper instructions for its

collection. This is manifestly the rule clearly announced in a large majority of the adjudged cases. And whatever might be our impressions if the case were one of first impression, we regard the rule too well and firmly established to feel ourselves at liberty to disturb it.

In this case, it appears that the defendants received the bill in controversy for transmission for collection, and in due season forwarded it to their correspondents at the residence of the drawees. That they were competent and reliable, and that defendants in no way contributed to any loss that may have occurred. If, then, any liability has been incurred to the plaintiffs, it is by the St. Louis house, who became their agents, and not by the defendants. The judgment of the court below must therefore be affirmed.

Judgment affirmed.

LIABILITY OF BANK TAKING NOTE OR BILL PAYABLE AT DISTANCE extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions: See note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313, where this subject is fully discussed; *Daly v. Butchers' and Drovers' Bank of St. Louis*, 56 Mo. 100, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Marine Bank of Chicago v. Bankmore*, 28 Ill. 472.

CITY OF QUINCY v. WARFIELD.

[25 ILLINOIS, 317.]

DEMURRER TO SPECIAL PLEA AMOUNTING TO GENERAL ISSUE SHOULD BE SUSTAINED.

MUNICIPAL AUTHORITIES WHO ARE AUTHORIZED TO ISSUE BONDS GENERALLY may, without express authority, issue such bonds in lieu of others overdue, and they are the judges of the propriety of such action.

IF MUNICIPALITY ONLY AUTHORIZED TO ISSUE BONDS BEARING EIGHT PER CENT INTEREST issues bonds bearing twelve per cent interest, such bonds will be valid *pro tanto*, and will be binding on the city, with interest to be calculated at eight per cent.

WHERE RECOMMENDATION OF FINANCE COMMITTEE OF CITY COUNCIL IS NECESSARY to authorize issuance of bonds, and nothing appears to the contrary, it will be presumed that such recommendation was made.

DEBT on a bond of the city of Quincy. The facts are stated in the opinion.

Wheat and Grover, for the appellant.

Browning and Bushnell, for the appellees.

By Court, BREESE, J. Express authority is given to the city council of the city of Quincy to issue bonds to an amount not exceeding, at any one time, in the aggregate, the sum of seventy-five thousand dollars, and not bearing a rate of interest higher than eight per cent per annum, to be paid annually, or semi-annually, at the option of the city council: Private Laws of 1857, p. 1052.

The bond in question was issued in August, 1858, in lieu of another bond issued by the city, and the accumulated interest thereon and then overdue, and made to bear interest at the rate of twelve per cent per annum.

The case went to the jury on the plea of *non est factum*, and that no presentation for payment was made before suit brought, both which issues were found for the plaintiff Warfield. The court ruled out, on demurrer, two other pleas filed by the city, and properly, because neither of them set up any defense that could not be available under the general issue. They are both wanting in nearly all the essentials of a plea of usury.

It is urged now here on this appeal that the city is not liable on this bond, because it stipulated for the payment of twelve per cent interest per annum; that it is void because the city had no power to execute bonds for bond indebtedness, for the purpose of procuring an extension of time for payment, or for any other purpose, and no power to issue a bond for any purpose, bearing more than eight per cent interest per annum.

A reference to the various charters, amendatory and otherwise, of the city of Quincy, to be found in Laws of Special Session of 1839, p. 113, in the Private Laws of 1857, at pp. 163-175, 1052, will show that no express power is granted to issue a bond for and in lieu of an overdue bond, but the general power to issue them within a fixed limit as to amount, is expressly given, as we have stated, and without any regard to the purpose. It is true, the provisions of the charter, authorizing the issuing of bonds, do contemplate that the city council will provide, by taxation, for their payment when due, being required to establish a sinking fund for such purpose, and doubtless this is the true policy. But in the judgment of the city council it may not be expedient or wise to levy the annual tax necessary for such purpose. Such may be the condition of the tax-payers as to render it extremely difficult to raise the taxes, added to their various other heavy burdens, and it might be, for the exigency, good policy to pay interest for further time. Of this the city council should judge, and as the original bond

was issued in pursuance of their chartered powers, we are not satisfied that they could not issue another in renewal of it, if not prepared to pay it. Individuals and all corporations so act, and in such a matter a municipal corporation should not be an exception, unless the charter of their powers expressly restrains them, which is not pretended in this case.

But it is said the bond is void, because it stipulates for a greater rate of interest than eight per cent per annum. In the case of *Johnson v. Stark County*, 24 Ill. 75, we recognized the doctrine that in exercising a power, all acts performed in excess of or beyond the power delegated must be rejected as unwarranted; but if, after the rejection of such acts, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted shall be upheld, whilst all beyond the power shall be rejected as an excess of power.

Upon this ruling in this case, we must decide, and do decide that the bond is valid and binding on the city, with interest, to be calculated at eight per cent per annum. It is not vitiated by the excess, but only *pro tanto*, and the court trying the case should have made the deduction, and given judgment for the bond, with interest at eight per cent per annum, the city having no power to stipulate for interest beyond that rate.

As to the other objection, that it is not shown the resolve of the city council of July 12, 1858, under which this bond was issued, was based upon the recommendation of the finance committee, we can only say we will so intend, there being nothing averred or shown against such an intendment.

For the excess of interest adjudged against the city, the judgment is reversed, and the cause remanded for other proceedings not inconsistent with this opinion.

Judgment reversed.

CITY OF QUINCY v. THOMAS CHAPMAN.

By Court, BREESE, J. This case is, in all material respects, the same as the preceding case. The demurrer to the third, fourth, and fifth pleas was properly sustained, for the reason they present no defense which could not be made under the general issue, and are not formally or substantially pleas of usury.

The judgment, for the reasons given in the case of *City of*

Quincy v. Warfield, ante, p. 330, is reversed and the cause remanded.

Judgment reversed.

MUNICIPAL AUTHORITIES HAVE POWER TO PROVIDE FOR PAYMENT OF CORPORATE DEBTS, in such manner as the holders of the indebtedness and they may agree upon: *Village of Hyde Park v. Ingalls*, 37 Ill. 13, citing the principal case.

HILL v. BISHOP.

[35 ILLINOIS, 342.]

MECHANIC'S LIEN IS NOT CREATED BY PURCHASE OF LUMBER ON OPEN GENERAL ACCOUNT, without reference to its being put into, or used in, any particular building.

BILL to foreclose mechanic's lien. The opinion states the case.

Gookins, Thomas, and Roberts, for the plaintiffs in error.

C. H. Moore, for the defendants in error.

By Court, CATON, C. J. This petition is manifestly insufficient. It shows that the lumber was furnished upon an open general account, and without reference to its being put into any particular building, or even that it should be used in any building. It would have been no violation of the agreement to purchase it, if the material bought had been used in making furniture or any other personal property. Under our statute, no lien could be created upon any premises by such a purchase of lumber.

The decree must be reversed, and the suit remanded, with leave to the petitioner to amend his petition.

Decree reversed.

MECHANIC'S LIEN ATTACHES ONLY WHERE MATERIAL HAS BEEN ACTUALLY USED on the land and building: *Hunter v. Blanchard*, 68 Am. Dec. 547, note 549, where other cases are collected; *Croskey v. Corey*, 43 Ill. 444; *Talbot v. Goddard*, 55 Ind. 502, both citing the principal case. For note on lien of material-men, see *Chapin v. Perce*, ante, p. 263.

SCAMMON v. CITY OF CHICAGO.

[25 ILLINOIS, 424.]

OWNER OF LAND WHO CONTRACTS WITH COMPETENT AND SKILLFUL BUILDERS TO ERECT BUILDING THEREON, and delivers the premises into the actual exclusive possession of the contractor for a definite period, is not liable for damages to a stranger passing by, caused by the negligence of such contractor. The remedy of the party injured is against the contractor, or the corporation within which the property is situated.

ACTION on the case brought against the defendants by the city, to recover from them the amount of damages covered by a judgment against the city in favor of one Ormsby. Ormsby recovered judgment for damages for injuries caused to him by falling into an excavation in the street in front of the lot of the plaintiffs in error. The city paid this judgment, and brought this action to recover back the money paid. The other facts appear from the opinion.

Scammon, McCagg, and Fuller, for the plaintiffs in error.

T. L. King, for the defendant in error.

By Court, WALKER, J. It is urged that the contractors, and not the owners of the property, are liable for the damages sustained by Ormsby. And that inasmuch as it was not a necessary incident to the improvement, but was produced by the mode in which the work was performed, the appellants discharged their whole duty when they employed competent, skillful, and prudent contractors, and can by no means be held liable for any neglect or default of theirs, whilst engaged upon the building or sidewalk. It seems to be conceded that the city was primarily liable, as the law has imposed the duty upon that body to keep the streets and sidewalks in a condition for safe and convenient transit of all persons. It is likewise conceded that the contractors who were engaged in the construction of the work are liable for a want of due care in its completion. But the question is presented, whether the owners of the freehold, by whom the contractors for the performance of the work were employed, are liable to the city.

It is a rule of very general, if not of universal, application, that the master is liable for the negligence of his servant, whilst acting under the direction of the master. Then does this case come within the rule? Were these contractors the servants of the owners? That they are not, seems to us apparent. They were not bound to perform the labor under the direction of the owners, or their agents, but under their com-

tract. It was not to them that the contractors looked for directions, but to the agreement. They were bound to furnish the materials and labor, and complete the building within a given time, and the owners had no right to control the selection of the materials or direct when the work should be performed, but only to look to their contract for its performance in pursuance to its terms, conditions, and specifications. And the contractors, for the time being, were let into the actual possession and control of the property, and the owners excluded from its occupancy.

It is perfectly apparent that the mere fact that a person is the owner of the fee or the reversion of the premises cannot create such a liability. If so, the negligence of a tenant for a term of years, a tenant in dower, by the courtesy, or any other tenancy, would create this liability. So of a disseisor or other wrong-doer in possession. To hold the remainderman or reversioner liable for such wrongs would be to enable a tenant or other person in possession to commit such acts as might be ruinous to the owner. It will hardly be contended that if the appellants had let these premises to the contractors for a term of years, with the agreement that the rent should be paid by the erection of their building, according to the terms and specifications contained in the agreement, and this accident had occurred, that the appellants would have been liable to any person. They could by no rule of law, of which we have any knowledge, be liable in such a case.

The reason why the master is rendered liable for the negligent acts of his servant, resulting in injury to others, is because the servant, while he is engaged in the business of the master, is supposed to be acting under and in conformity to his directions, and to hold him to the employment of skillful and prudent servants. The presumption is one of law, and hence cannot be rebutted. But in this case the reason fails, and the presumption must also fail. These contractors, as we have seen, were not working under the directions or control of appellants, but under their contract, and were in no sense their servants. And the appellants had on their part neglected no duty, as they had employed skillful and competent contractors, accustomed to such business, and fully acquainted with the dangers incident to its performance. Then, upon what principle, or by force of what rule, is it that liability is incurred? We are unable to perceive any which creates it.

All liability for injury sustained is based upon the theory

that the party liable has committed a wrong, or neglected some duty. That direct or consequential injury has resulted from the employment of immediate force, or the negligent performance of some legal duty, or in the negligent use of persons or property, whereby an injury has resulted to another. It seems to us that the doctrine would be productive of great wrong, to hold that when owners of real estate, who contract with reliable, competent, and skillful builders, and deliver the premises into the actual exclusive possession of the contractors for a definite period, and when neither the contractors nor their servants are under the control of the owners, that they must be liable for all of the negligent acts of the contractors and their servants. And whilst it may be true that some tribunals may have held such to be the rule, other courts of equal authority have announced the opposite as the correct doctrine. That the adjudged cases are irreconcilably conflicting seems to be true. This being the case, we feel ourselves at liberty to adopt the rule which seems to be most consonant with reason and justice. And we are the more ready to do so, when public policy interposes no obstacle.

It is supposed that the cases of *Leshner v. Wabash Navigation Co.*, 14 Ill. 85 [56 Am. Dec. 494], *Hinder v. Wabash Nav. Co.*, 15 Id. 72, and *Chicago, St. Paul, and Fond du Lac R. R. Co. v. McCarthy*, 20 Id. 385 [71 Am. Dec. 285], are decisive of this question. In each of these cases, it was held that the appropriation of timber from adjoining land, to the construction of the road, was by virtue and in pursuance of the authority granted by the company, and that when exercising that statutory authority, whether by themselves or their contractors, the company must be held responsible. It was regarded an important fact that the work was being performed under the directions of their engineer. In those cases, the law authorized the company to appropriate the timber to their use, and it was held that they had delegated the authority to the contractors. Whilst in this case, the law had conferred upon appellants no power to perform the act which resulted in the injury to Ormsby, nor did they authorize or direct the contractors to perform the act. The contractors had bound themselves to perform it, and it devolved upon them to obtain the requisite permission and authority. The negligence was wholly theirs, unnecessary to the accomplishment of the work, and in no way connected with its proper performance.

Had the necessary precautions been used, to have had a

suitable plate to close the opening, when the grating was laid, or failing in that, had it been properly covered, the injury need not have been sustained. The contractors did not pretend to derive any power from appellants, to place materials in the street, but on the contrary, applied to and obtained permission from the city. We are, for these reasons, of the opinion that the true rule in cases of this character is, if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable, but if it is from the negligence of the contractor, or his servants, that he should alone be responsible. That this omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work, but from the negligence of the contractors or their workmen, we think is manifest, and hence the appellants are not liable for the damage sustained by Ormsby.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

LIABILITY OF MUNICIPAL CORPORATION FOR INJURY from improper manner in which its work is done: See *Bushman v. Meredith*, 72 Am. Dec. 302, note 314, where other cases are collected.

LIABILITY OF MUNICIPAL CORPORATIONS FOR INJURIES ARISING FROM DEFECTIVE SEWERS, or from neglect to repair streets, etc.: See *City Council of Montgomery v. Gilmer*, 70 Am. Dec. 502, note 570, where other cases are collected; *Commissioners v. Martin*, 69 Id. 333, note 333. A city is liable for damages caused by not keeping its sidewalks in repair: *City of Bloomington v. Bay*, 42 Ill. 507; *City of Springfield v. Le Claire*, 49 Id. 479, both citing the principal case.

OWNER OF LAND WHO EMPLOYS SKILLFUL CONTRACTOR TO ERECT BUILDING, and gives up possession to him, is not liable for injury to third persons caused by the contractor's negligence: *Schwartz v. Gilmere*, 45 Ill. 457; *Pfau v. Williamson*, 63 Id. 18, 22, both citing the principal case.

WHERE RELATION OF MASTER AND SERVANT DOES NOT EXIST, but the work is let to a principal contractor, the owner of the property is not responsible for the negligent conduct of the workmen employed by the contractor in performing the work: *Prairie State L. & T. Co. v. Doig*, 70 Ill. 54; *Hale v. Johnson*, 80 Id. 186; *Kepperty v. Ramsden*, 83 Id. 359; *City of Joliet v. Harwood*, 86 Id. 114, in dissenting opinion of Scott, J.; *City of Logansport v. Dick*, 70 Ind. 78; *Ryan v. Curran*, 64 Id. 355, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Stephani v. Brown*, 40 Ill. 433, to the point that one who, without authority from the city, creates and maintains a nuisance in the streets, is liable to a person who is injured thereby. It is distinguished in *Glickauf v. Mawer*, 75 Id. 290.

NORTON v. HIXON.

[25 ILLINOIS, 439.]

WHERE SHERIFF ATTACHES VESSEL WHICH PASSES INTO HANDS OF STRANGER with knowledge of the attachment, the lien of the attaching creditor will, in equity, be allowed to follow the vessel, and attach itself to the money in the hands of such stranger for which the vessel was sold by him.

WHERE TRUSTS, EVEN OF OFFICIAL CHARACTER, HAVE BEEN VIOLATED, equity takes jurisdiction.

BILL in chancery, filed by Jeremy Hixon, jun., against Horace Norton, Joel C. Walter, Edward K. Rogers, William L. Church, and the Lexington Fire, Life, and Marine Insurance Company, upon which default was taken for want of a further answer, and a decree entered against the defendants, Norton, Walker, and Rogers, who appealed. The facts necessary to an understanding of the case are: Hixon, being a creditor of the Lexington Fire, Life, and Marine Insurance Company, sued out an attachment against it, which was levied by the sheriff Church on a vessel called the Buena Vista, as the property of the company. The sheriff put the vessel in possession of Norton, Rogers, and Walter, who used her for several years, during which time she earned, or should have earned, thirteen thousand dollars, which sum complainant claimed ought to be applied to the payment of the judgment for three thousand four hundred and twenty-nine dollars and costs, which he recovered against the company in the suit in which the vessel was attached. Norton, Rogers, and Walter sold the vessel to Boyce & Fisk for five thousand five hundred dollars. After Hixon obtained judgment against the insurance company, he caused an execution thereon to be issued and delivered to John L. Wilson, the successor in office of William L. Church, late sheriff. Wilson returned the writ with the indorsement that he had demanded the vessel and her earnings of Church, who said he had not the vessel or her earnings in his possession. Wilson, being unable to find said vessel or earnings, returned the execution unsatisfied. The court below rendered a decree in favor of Hixon, and against Norton, Walter, and Rogers, for four thousand four hundred dollars and twenty-seven cents, from which decree they appealed. Other facts are stated in the opinion.

Williams, Woodbridge, and Grant, for the appellants.

H. B. Hurd and G. Goodrich, for the appellee.

By Court, CATON, C. J. But few cases before this court have been the subject of more frequent or more protracted conference than this, and certainly none where the amount involved in the controversy has not been greater. It is not necessary to decide the question which has been so much discussed and so much considered, whether the earnings of the vessel, after she was attached and while she should have been in the custody of the sheriff, are liable to be applied to the payment of the judgment obtained upon the debt for which she was attached, for the case shows beyond all controversy that the vessel sold for more than sufficient to pay the judgment which the complainant obtained in the attachment suit.

Admitting the jurisdiction of the court of equity to grant relief by ordering Norton & Co., who sold the vessel and received the pay therefor, to apply that money to the payment of this judgment, it is objected that the statements of the bill are insufficient to warrant that relief. The frame of the bill would no doubt indicate that the complainant was not advised whether the vessel had been sold, or not, or at any rate that he was not aware that she had been sold for enough to pay his judgment, and it seems to have been the object of the bill to reach the earnings of the vessel, rather than the proceeds of the sale. After much consideration, we are not prepared to hold that the bill is not sufficient to reach the proceeds of the sale of the vessel in the hands of the defendants, as well as her earnings, but on the contrary, we think it is sufficient for that purpose. This is not a case where a precise statement of all the particular facts, a knowledge of which may be confined to the defendants alone, is required to be stated in the bill.

The most important, if not the most difficult, question in the case is that of jurisdiction. That the complainant had a complete remedy at law, by an action on the sheriff's bond, there can be no doubt, and ordinarily this is sufficient to induce a court of chancery to decline to take jurisdiction of the matter. Yet there are many cases where this is not so. Where trusts have been violated, although they be trusts of an official character, equity takes jurisdiction. There are many cases where executors and administrators have been held answerable in equity, at the suit of creditors and legatees, for misapplication of assets, although the complainant had a perfect remedy at law, on the official bond of the defendants. The same jurisdiction seems always to have been exercised over assignees in bankruptcy, where the law also afforded the same

remedy. In such cases as these, no doubt seems to have been entertained of the jurisdiction of the court to afford the appropriate remedy. Here is as much a violation of a trust as in those cases. The sheriff, in violation of the confidence and trust reposed in him, and of his duty to the complainant, delivered the vessel to Norton & Co., who used her for a long time at great profit, and then sold her. Now, whatever may be said of the right of the attaching creditors to have these earnings applied to the satisfaction of the debt for which she was attached, there can be no doubt that the complainant had, by virtue of his attachment, a specific lien on the vessel itself. And when she is sold in disregard of this right, and the money passed into the hands of strangers, with full knowledge of the complainant's attachment, as was the case here, in equity at least, this lien must be allowed to follow and attach itself to the money. Since there was sufficient of the purchase-money of the vessel in the defendants' hands to answer the amount decreed to the complainant, it is unnecessary to inquire whether the court below designed it should be paid out of the earnings of the vessel or the money for which she was sold. It is sufficient that there was money in the defendants' hands sufficient to satisfy the complainant's demand, which is undoubtedly liable, in equity at least, to be applied in such satisfaction. Hence it is unnecessary to inquire who is entitled to the earnings of the vessel.

The decree must be affirmed.

WALKER, J. I concur with the chief justice in the conclusion at which he has arrived in the foregoing opinion. But at present I am unprepared to hold that the earnings of the vessel may be reached by a bill in equity. It however being unnecessary, in the view I take of the case, to determine that question, I shall decline its discussion at this time.

BRESEE, J., delivered a separate opinion, in which he said that he went further than the majority of the court in his view of the case. After stating the facts and the principal allegations in the charging part of the bill, he said he did not understand these allegations as the appellants seemed to understand them. The appellee, he said, did not claim the legal title to the vessel attached, but rather, as the general ownership was in the defendant in attachment, that he had an equitable interest, by means of his levy, to the extent of his judgment, and the sheriff had a special property in the vessel, subject to the rights of all contending parties, and if the vessel was not produced to satisfy his judgment, but was let out or hired to others by the sheriff, the appellee was entitled to an account for her net earnings, and to have his judgment paid out of them, or if sold, out of the proceeds of the sale. This

seemed to the judge to present a plain case for the interposition of a court of equity, one of whose familiar subjects of jurisdiction and cognizance is the execution of trusts. The appellee acquired a lien on the vessel by his writ of attachment, and when the sheriff took her into his possession, he became a trustee, as well for the appellee as for others who might have an interest in her. The sheriff was bound to account for the property, and if he put it out of his power to produce it to be sold under the execution, and in violation of his duty, placed it in the hands of other parties, who have made earnings by the use of the vessel, and had finally sold her, and cannot now produce her to satisfy the execution, a case has arisen to call into exercise the powers of a court of chancery, which, by a searching examination of the consciences of the parties implicated in the transaction, can effect a full discovery of all the facts necessary to be known. The sheriff, being the trustee for all concerned in the goods attached, the power of the court attaches on the trust property, and it, or its avails, can be pursued into the hands of any person who may have possessed himself of it. When the vessel was let to Norton & Co., it was property in trust, and any party interested in it ought to be allowed to compel a discovery as to the disposition of it. The act of the sheriff in disposing of this vessel was wrongful, and the appellants participating in it are in the condition of all others who enter into an unlawful transaction with one who is intrusted by law with a fund for the benefit of others. All such parties may be made defendants in a bill to discover the proceeds of the trust, and to compel an account. This is not a creditor's bill, either in form or substance; it is a bill to get at the proceeds of property on which the appellee had an equitable lien, while in the sheriff's hands, and which the sheriff, by his own wrongful act, put into the possession of his co-defendants, who made large profits by the use of it, and then sold it for a large sum of money. His honor referred to Story's Equity Jurisprudence, 695, where the principle upon which this bill can be sustained is stated. He added that, upon the ground of fraud as well as trust, the jurisdiction of chancery in this case cannot be questioned. Courts of equity have, in regard to frauds, actual or constructive, adopted broad and comprehensive principles in exercising their remedial jurisdiction. Where there is fraud touching property, they will interfere and administer, sometimes, severe justice in favor of innocent persons who are sufferers by it, without fault on their part. For this purpose, they will convert the offending party into a trustee, and make the property itself subservient to the proper purposes of recompense. The appellee's remedy was, he thought, of necessity in equity. The ruling of the court below, in allowing the exceptions to the appellants' answer, was correct, and on their failure to file a further answer, it was proper to take their bill as confessed. The proceedings in reference to the master were in accordance with the statute, and the amount found is sustained by the proofs. The refusal of the court to set aside the default was a matter of discretion in the court; but even if it were not, a motion to set aside a default must be accompanied by a full and perfect answer, and the answer presented in this case is obnoxious to some of the exceptions allowed to the original answer. On a rule for further answer, a party files a defective or insufficient answer at his peril. The decree of the lower court is affirmed.

THE PRINCIPAL CASE IS CITED in *Burge v. Burge*, 38 Ill. 166, and in *Smith v. Brittenham*, Id. 294, to the point that, on an application to set aside a decree, the defendant must, by affidavit, show diligence, and accompany his application with a sufficient answer showing a meritorious defense.

CITY OF CHICAGO v. WHEELER. SAME v. BONNER.

[25 ILLINOIS, 478.]

IN ACTION AGAINST CITY TO RECOVER FOR REAL ESTATE TAKEN FOR PUEBLO STREET, the city will be estopped from urging that the commissioners appointed by it to ascertain and assess the damages were not disinterested freeholders of the city. It cannot be allowed to avail itself of its own wrong.

CITY, BY PROCEEDING TO ACT UPON REPORT OF COMMISSIONERS APPOINTED BY IT TO ASSESS DAMAGES FOR LAND TAKEN FOR PUBLIC STREET, waives all objection to irregularities in the selection or appointment of such commissioners.

OMISSION OF DOLLAR-MARK FROM SOME PARTS OF ASSESSMENT, made in proceedings to open a street, will not invalidate the assessment, if there are sufficient evidences on other parts of the roll by which to determine the amounts to be paid.

INTEREST SHOULD BE ALLOWED ON AMOUNT OF DAMAGES AWARDED FOR LAND taken for opening a public street, where such amount remains unpaid for two years after the confirmation of the report of the commissioners making the award.

ASSUMPSIT. The opinion states the cases.

J. L. King, for the appellant.

Farwell and Smith, for Wheeler.

Arnold, Lay, and Gregory, for Bonner.

By Court, WALKER, J. The questions presented by these records are the same in all respects, and will, therefore, be considered together in this opinion. The cases were special *assumpsit*, for the recovery of damages awarded to appellees, which they had severally sustained by the appropriation of their real estate to the use of the city, in the extension of La Salle street. On the trial below, the appellees introduced and read in evidence, against the objection of appellants, the assessment rolls, in which the commissioners had reported the amount of damages appellees had severally sustained by the appropriation of their lots for this improvement. The city, objected to it as evidence, because it fails, on its face, to show that the commissioners making the return were disinterested freeholders, residents of the city of Chicago, and that there are no words, signs, or characters employed in the assessment roll indicating what the figures therein employed were designed to represent.

By the order of the city council, entered on the twelfth day of November, 1855, they resolved to proceed to the election, by ballot, of three reputable, discreet, and disinterested freehold-

ers of the city of Chicago, to ascertain the damages, etc., occasioned by opening of this street. They proceeded, and elected the commissioners. It appears by this resolution that they were fully apprised of and determined to discharge their duty. And notwithstanding the order appointing them to act fails to recite that they are disinterested freeholders of the city, it does not lie with the city to insist that it failed to perform its duty. It cannot be heard to insist upon and avail itself of its own wrong. To permit it to urge this objection, after the real estate thus condemned to public use has been appropriated, and the owners wholly deprived of its use, would be to sanction fraud and injustice that would be intolerable in any court. We have no hesitation in saying that the city is estopped from urging this objection.

But even if it is not estopped by the appointment of the commissioners, this is a requirement which the parties may undoubtedly waive. And the parties may manifest an intention to waive this requirement of the statute, expressly or by implication. This provision was inserted to secure fairness, and prevent partiality, and it is for the mutual benefit of the parties. But it is not imperative. These commissioners perform the duties of jurors or arbitrators, when acting under the commission. And whilst the law has provided that jurors and arbitrators shall be disinterested, the practice has ever obtained that the person electing a juror, or choosing an arbitrator, cannot be heard afterwards to insist, in avoidance of the verdict or award, that the juror or arbitrator was interested, unless imposition has been practiced. It is, however, otherwise, where the party is not present, and takes no part in the proceeding. In this case, the city selected the commissioners, and if not disinterested, they waived the objection by proceeding afterwards as though they were in all respects competent. They received and approved their report, ordered the street to be opened, the assessments to be collected, and the damages to be paid; and these acts, we think, afford abundant evidence that even if the commissioners were not disinterested, or were not freeholders, or did not reside in the city, that appellant waived the objection, as they had competent authority to do, and cannot now be heard to object.

In regard to the second question, this court has repeatedly held that in assessments for taxation and the assessment of damages, and the amount of compensation to be paid, in these proceedings, the amount must be in dollars and cents, designated

by some character, word, or mark. But in this case, the assessment roll has the character indicating dollars annexed to the figures comprising the total at the foot of the columns headed "costs of proceeding," "net damages," and "net benefits," but no word, character, or mark is employed to designate the amount in the column headed "valuation." In the case of *Gibson v. Chicago*, 22 Ill. 566, we say: "The court is disposed to embrace anything which, by fair and reasonable intendment, can inform us of the meaning of the figures employed in the assessment." In this case, we see the bottom of the column headed "net damages" is footed up "\$135-828.00," and the two "00" are separated from the other figures by a single line. This manifestly represents one hundred and thirty-five thousand three hundred and twenty-eight dollars. And when we see, on the top of the last and preceding pages, written, "amount bro't forward," and at the bottom of each page, "amounts carried forward," and by the addition of all the figures in each of the columns headed "net damages," that it makes the total sum of the footing, it renders it morally certain that the figures placed opposite the names of each of these appellees were designed to represent the sum in dollars and cents, which was assessed as their damages. The amount is as certainly determined as if the dollar-mark had been placed at the head of the column or at the left-hand side of the figures opposite their names. If it appears from any part of the report what the figures were designed to represent, it will suffice.

Then, was it essential in this proceeding that the figures placed in the column headed "valuation" should have designated the sum which they were employed to represent? The statute has not, in terms, required the commissioners, in this proceeding, to report the value of real estate assessed, either as benefited or damaged by the improvement. The eighth section of chapter 6 of the city charter requires the commissioners to make an estimate, and if the damage be greater than the benefit received, or if the benefit be greater than the damage, in either case they shall strike a balance, and carry the difference forward to another column, so that the assessment may show what amount is to be received or paid by the owners respectively, and the difference only shall be collectible or payable to them. Here we perceive the object contemplated is to ascertain the sum each property holder is damaged beyond the benefits received, or benefited beyond

the damage sustained. This damage or benefit is in no way dependent upon the value of the property affected. The portion of a lot appropriated, the change in its improvements, the condition in which it is left, its nearness or remoteness to the improvement, etc., are the basis of these estimates, and not the value of the land. It is the amount of benefits received or damages sustained which has to be ascertained, and this without reference to the value of the property affected.

This proceeding is very different in its operation from a levy to pave or grade a street by assessment on the adjoining property. In that proceeding, the common council is limited in levying the assessment to a sum not exceeding three per cent on the value of the property; whilst this proceeding has no limit but the amount of damages or benefits sustained by the property. In that proceeding, it is absolutely necessary that a valuation should be fixed, to enable the common council to make the levy. But no such necessity exists in this proceeding; and as the statute has not required it, and as we can perceive no necessity for it, we are clearly of the opinion that its omission will in no way affect the validity of the assessment.

By agreement, the appellees assign as cross-error that the court should have allowed interest on the amount of damages awarded them by the assessment. The second section of our interest law gives six per cent interest upon money withheld by an unreasonable or vexatious delay of payment. When this assessment was made, returned, and confirmed, the property condemned for the street became that of the city for public use, and the city became the debtor of the former owner, to the amount of the damages reported and allowed by the city on the confirmation of the report. This sum they justly owed, and were bound to pay within a reasonable time. The law has imposed the duty upon the common council to collect and pay it, and gives the city a lien upon all property assessed for benefits for the space of two years after the confirmation of the report: See City Charter, sec. 4, c. 8. From this provision, it is obvious that the general assembly regarded two years ample time in which to collect the assessments and pay the damages. And that they regarded a delay of more than two years as unreasonable is manifest, as the lien is taken away after that period has elapsed. And as the legislature has indicated that a delay of more than two years is unreasonable, we are of the opinion that, after the expiration of that time, the party is entitled to

receive interest on his damages. The court therefore erred in not allowing interest after the ninth day of June, 1858, that date being two years after the confirmation of the report. We shall reverse the judgments below, and as the amount which these appellees are entitled to receive depends upon computation only, we shall render the proper judgments here. Upon computation, we find that Wheeler is entitled to recover eighteen thousand six hundred and seventy-three dollars and forty-three cents, and Bonner the sum of twelve thousand one hundred and sixty-two dollars and sixty-five cents; for which sums judgments are rendered, respectively, in their favor in this court.

The judgments of the court below are reversed, and judgments rendered in this court.

Judgments reversed.

OMISSION OF DOLLAR-MARK, EFFECT OF: See *Northrop v. Sanborn*, 54 Am. Dec. 83, note 85, where other cases are collected.

CLAYBURGH v. CITY OF CHICAGO.

[25 ILLINOIS, 585.]

ACTION ON CASE FOR NEGLIGENCE LIES AGAINST MUNICIPAL CORPORATION, for the recovery of damages resulting from its willful neglect to perform a duty imposed by law.

WHERE CITY REFUSES TO COLLECT ASSESSMENT LEVIED TO COMPENSATE OWNER OF LAND for damages sustained by him by reason of opening a street over his lot, he has his election to sue in trespass or case, or to proceed for the value of the land.

ACTION on the case. The opinion states the facts.

Gookins, Thomas, and Roberts, for the appellant.

E. Anthony, for the appellee.

By Court, WALKER, J. This was an action on the case, for negligence in the city council, for failing to collect an assessment levied, to compensate plaintiff for damages sustained by reason of opening a street over his lot. To the declaration, the defendant filed a demurrer, which was sustained by the court below, and a judgment rendered against the plaintiff, to reverse which he prosecutes this writ of error.

In affirmance of the judgment, it is urged that the only remedy is by *mandamus*, to compel the city authorities to proceed in the discharge of their duty. The rule seems to be

well settled that corporations and incorporated companies may be sued in that character, for damages arising from a breach by them of a duty imposed by law: 1 Ch. Pl. 77. In *Angel & Ames on Corporations*, 327, it is laid down that an action on the case will lie against a corporation, to compel a transfer of stock. In the case of the application of *Shipley v. Mechanics' Bank*, 10 Johns. 484, for a *mandamus*, to compel the bank to allow the transfer of certain shares of stock, the court refused the writ upon the express grounds that the applicant had an adequate remedy by an action on the case to recover the value of the stock. The case of *King v. Bank of England*, Doug. 524, holds the same doctrine, and in that case the *mandamus* was for the same reason refused, as in the case of *Shipley v. Mechanics' Bank*, 10 Johns. 484. An action on the case, it has been held, will lie against a corporation for the neglect of a corporate duty: *Mayor of Lynn v. Turner*, 1 Cowp. 86. Numerous additional adjudged cases might be referred to in support of this rule, but we regard the rule well settled, that the party injured may maintain an action against a corporation, for a neglect of any duty imposed by their charter.

In this case, the law has imposed the duty upon the city, where they have appropriated private property for the use of the city, in widening or extending streets, to have the damages assessed, and to have the benefits resulting to others from the improvement also assessed, and collected, and compensation made for the damage sustained. This duty is clearly imposed; and the declaration avers that plaintiff's property was appropriated, his damages ascertained and allowed, but that the city, although they have had the benefits resulting to others from this improvement assessed, have wholly neglected and willfully refused to cause the assessments to be collected. Here a duty to the plaintiff is averred, and a willful refusal to perform that duty. This, we think, brings this case clearly within the rule established by the adjudged cases, and presents a case, if sustained by the evidence, entitling the plaintiff to a recovery.

It was objected that as this court had held that *assumpsit* might be maintained for the value of the land appropriated, the action of case would not lie. In many cases, the party injured has his election whether he will sue in trespass or case, or will waive the tort and proceed for the value of the property. So, in this case, the plaintiff might rely upon the

willful refusal of the city authorities to discharge their duty, by which he has sustained injury, or he may waive the tort and proceed for the recovery of the value of the land which they have appropriated to the use of the city. We have no hesitation in saying that he may elect as to which form of action he will resort.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

LIABILITY OF MUNICIPAL CORPORATION FOR NEGLIGENCE TO PERFORM DUTY: See *City Council v. Gilmer*, 70 Am. Dec. 562, note 570, where other cases are collected. A city is liable for injuries arising from the non-performance of a duty imposed by law: *City of Bloomington v. Bay*, 42 Ill. 507; *City of Springfield v. Le Claire*, 49 Id. 478, both citing the principal case. An action lies against a city for failing to provide compensation for damages for land taken under the eminent domain law: *City of Elgin v. Eaton*, 83 Id. 537. In the case of *Hill v. Boston*, 122 Mass. 379, Gray, C. J., delivering the opinion of the court, said of the decision in the principal case: "Of that decision, it is enough to say that it is wholly inconsistent with the system of judicial remedies in this commonwealth."

HANKINSON v. LOMBARD.

[25 ILLINOIS, 572.]

WHERE PARTY GIVES NOTICE OF TAKING TWO DEPOSITIONS IN DIFFERENT PLACES AT SAME HOUR of the same day, so that the opposite party cannot be present at both places to cross-examine the witnesses, the latter may elect which examination he will attend, and the deposition taken at the other place must be suppressed.

QUESTION OF AGENT'S AUTHORITY TO INDORSE NOTE is for the jury to determine.

ASSUMPSIT against the appellants as the indorsers of a note. There was a judgment for the plaintiff below, and the defendants appealed. The other facts are stated in the opinion.

J. K. Cooper, for the appellants.

M. Williamson, for the appellee.

By Court, WALKER, J. The first question in this case which we propose to consider is, whether the court below erred in refusing to suppress the deposition of Isaac G. Lombard. It appears from this record that plaintiff below served a notice on defendant's attorney that he would, on the fourteenth day of September, 1859, take the deposition of John C. Stewart, at the town of Galesburg, in Knox county, and of Isaac G. Lombard, in the town of Henry, in the county of Mar-

shall, at the same hour of the same day. That one of the defendants attended at the time and place named, and cross-examined the witness Stewart. And this defendant swears that if the deposition of Stewart had not been taken at the time it was, he should have attended for the purpose of cross-examining Lombard, but that he was unable to attend at both places, and that it was not convenient to procure the services of another person to attend to cross-examine Lombard. It also appears that Galesburg is fifty-five miles from the city Peoria, and Henry is forty miles from the same place; by a direct line from one point to the other, it is about eighty miles.

The tenth section of the act regulating evidence (Scates's Comp. 257), provides that upon filing a satisfactory affidavit, the party may take the deposition of a material witness residing in a different county from that in which the suit is pending, after having given at least ten days' notice to the opposite party, and one day in addition (Sundays excepted), for every thirty miles travel, etc. It is apparent that it was the design of the law that the opposite party should have ample notice that he might attend when any deposition should be taken. If the opposite party may give notice to take the depositions of different witnesses at various places on the same day, and no objection could be allowed, the design of the law would thus be defeated, as his right of cross-examination would be destroyed. This enactment, like all others, must be so interpreted as to effectuate the design of the law-makers. Any practice, therefore, which would deprive the opposite party of the right of cross-examination, which the law has secured to him, cannot be sanctioned, although apparently within the letter of the law. As the defendant could attend at but one of these places at the time designated, it follows that he might elect which it should be, and have the other suppressed. The court therefore erred in not suppressing Lombard's deposition.

It is, however, urged that notwithstanding the notice was insufficient, the party might afterwards proceed to cross-examine the witness. We are aware of no such practice, and are not disposed to adopt it in our courts. It is opposed, we think, to the spirit, if not the letter, of the statute, which requires a sufficient notice to enable the party to attend. If the notice is sufficient, then the deposition is well taken; but if insufficient, as we have seen that it was, the deposition, on a proper motion, should be suppressed. An insufficient notice

is the same as if none were given, and no authority exists but that contained in the statute, to take a deposition in a case at law; and to render it available, the requirements of the statute must be complied with in every essential part.

It is insisted that the judgment should not be reversed, as Stewart's evidence was sufficient without Lombard's. This evidently was not the view taken of it by appellant on the trial below, or he would not have introduced it in evidence. We are not able to determine what weight the jury gave to this evidence. It was certainly much more clear, explicit, and satisfactory on the question of non-residence than was Stewart's. We are not prepared to say that the jury would inevitably have found as they did, independently of Lombard's evidence.

The question of Milcham's agency and authority to indorse the note was one of fact, and for the jury alone to determine. The evidence tends to show that he was the general agent of payees, and that as such he made the assignment, and that they ratified it when informed of the fact. The jury were the judges of the weight proper to be given to the evidence, and we have no disposition to find fault with the conclusion at which they have arrived on this question.

For the error in overruling the motion to suppress Lombard's deposition, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

IF DEPOSITIONS ARE TAKEN AT DIFFERENT PLACES AT OR NEAR SAME TIME, the court may, when the depositions are offered in evidence, suppress those of the witnesses whom the adverse party has thereby been deprived of a reasonable opportunity to cross-examine: *Cole v. Hall*, 131 Mass. 90, citing the principal case.

REASONABLE NOTICE OF TIME AND PLACE OF TAKING DEPOSITIONS MUST BE GIVEN: See *Attwood v. Fricot*, 76 Am. Dec. 567; *Hunt v. Crane*, 69 Id. 381.

DEERE v. CHAPMAN.

[25 ILLINOIS, 610.]

HOMESTEAD ACT IS REMEDIAL IN ITS NATURE, and must be so construed as most effectually to meet the benevolent end in view in its enactment, without, however, departing from the plain and obvious meaning of its language.

HOMESTEAD ACT PROTECTS OWNER OF LOT AND BUILDING THEREON OCCUPIED BY HIM as a home, although the estate therein owned by him be less than an estate in fee.

EJECTMENT brought by John Deere against James Chapman, to recover a lot in the village of Moline. The plaintiff claimed an estate for the life of the defendant, and alleged that he was in possession, and that the defendant entered, etc. The case was tried before the court without a jury. The court gave judgment in favor of the defendant. Other facts appear from the opinion.

E. T. Wells, for the plaintiff in error.

Chapman and Jackson, for the defendant in error.

By Court, **BREESE, J.** The homestead act provides, that in addition to the property exempt by law from sale under execution, there shall be exempt from levy and forced sale the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars: *Scates's Comp.* 516.

The question arises upon the definition to be given to the word "owner."

The appellant contends that the words of a statute, when unambiguous, as in this statute, should be taken in the ordinary, natural, and most commonly received sense, and so taking the word "owner," it conveys the idea of absolute property, and nothing less. He cannot conceive that a thing should be owned by one person, and also that another should have a title to it, for although different interests in the same subject-matter may be owned by different persons, yet to the thing itself there can be but one title and one owner. He also contends that if there be room for construction, such a statute as this, giving new rights and immunities, and of doubtful policy, ought not, thereby, to be extended beyond the plain import of the terms used, and that this statute, being in derogation of the common law, should be construed strictly as against those seeking advantage of it.

We fully agree with the appellant, that where the words of a statute are clear and unambiguous they must be taken in their ordinary, natural, and most commonly received sense, and that statutes in derogation of the common law, not clearly remedial in their nature, should be construed strictly as against those seeking their benefits.

But are the words of this statute so clear and unambiguous as to forbid construction? Is it certain the legislature intended, by the term "owner," to embrace only the absolute owner of

the fee? The law recognizes more than one description of ownership, both in real and personal property. There may be an absolute ownership and a qualified ownership of both descriptions of property, and the one is as fully recognized as the other.

It is true, a fee-simple estate is the highest estate in land known to the law, yet he who owns it is no more favored in the law than he who owns a freehold of less extent, as an estate in tail, for one's own life or the life of another, by the courtesy, or in dower. The owner of a life estate in land, if in possession, has as complete dominion over it as the absolute owner of the fee has over his estate in possession. He is the lord and master, during the continuance of his term, and can and must sue for all injuries to it, or trespasses upon it, he in reversion, or the owner of the fee, having no right to such action, and being himself subject to the action of the owner of the life estate, if he trespasses upon him. Such an estate can be sold on execution, under our general execution law, it being a tenement and real estate, and we would say that a fair construction of the homestead act, with reference to the objects and purposes to be accomplished by it, would embrace within it the estate which the debtor might own in the lot and buildings thereon, and occupied as a residence, and which could be sold on execution. The object of the law most clearly is, to secure the head of the family in the possession and enjoyment of the lot and buildings, for the maintenance and shelter of himself and family as a home, without any special regard to the extent of the estate or title by which he owned it. Owning an estate for his own life in the premises, the home of his family, we do no violence to the language of the act by considering him the owner, for all the purposes of the act, and the property vesting in him as owner according to the nature and extent of his estate. He is, to all intents and purposes, the owner of the immediate freehold and seised thereof, and as such, must be protected by the homestead act, and this is neither a liberal nor forced definition of the word "owner." It seems to us to be its most natural meaning, regarding, as we must, the purposes and object of the act.

Though this act may be said to be in derogation of the common law, and an innovation upon all former relations between creditors and debtors, giving to the latter new rights and immunities, yet it does not follow that it should not receive a construction so liberal, as to advance the object contemplated

by the legislature in passing the act. We regard the statute as remedial in its nature—intended to remove grievances under which the unfortunate labored, and to save them, amid all their losses and disasters, a shelter for the family—a home. Being remedial, it must be so construed as most effectually to meet the benevolent end in view, without departing, however, from the plain and obvious meaning of the language used in the act. We think we have not done so in defining the word “owner,” that the clear legal import of that word embraces as well the owner of a life estate in land as the owner of the fee therein.

The statute to which appellant has referred, chapter 105, to punish trespassers for cutting timber, which provides that the penalties provided in it shall be recoverable by an action of debt in the name of the owner, and the decision of this court thereon, that to entitle a person to recover these penalties he must show title in fee to the land, cannot bear upon this case, as that statute is highly penal in its character, and must be construed strictly for all purposes. This, on the contrary, is of a beneficent nature, and a different rule must prevail, one that will advance the remedy without doing violence to the language used.

Without any strained or forced construction of any of the words used in the act, we are satisfied the legislature never contemplated that the owner of an estate in a lot and dwelling-house occupied as his residence should own an estate in fee: a less estate will protect him. Why, it might be asked, did the plaintiff levy upon, sell, and become the purchaser of this lot, and bring his ejectment for the possession, if the defendant did not own the property? Had he succeeded in his ejectment suit, would he not have been put in possession and have become *quoad hoc* the owner?

The judgment must be affirmed.

Judgment affirmed.

BENEFITS OF HOMESTEAD LAW ARE NOT CONFINED TO OWNERSHIP IN FEE: *Conklin v. Foster*, 57 Ill. 107, citing the principal case. A tenant for life is an “owner” within the meaning of the homestead law: *Potts v. Davenport*, 70 Id. 458, also citing the principal case.

HOMESTEAD ACT IS REMEDIAL, and should receive a liberal construction: *Cole v. Marple*, 98 Ill. 64, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Wing v. Cropper*, 35 Ill. 264, to the point that unless the mode by which an exemption can be released or waived is pursued, the exemption is not lost.

CARROLL v. BALLANCE.

[25 ILLINOIS, 2.]

MORTGAGE DEED CONVEYS FEE IN LAND TO MORTGAGEE, whether it be executed to secure the payment of money loaned, or the performance of some other obligation, or to secure the payment of the purchase-money of the land itself.

MORTGAGEE MAY RECOVER MORTGAGED PREMISES IN EJECTMENT against the mortgagor or those claiming under him, when the mortgage debt is payable in installments, and one or more installments are due and unpaid; or even before condition broken.

MORTGAGOR IN POSSESSION IS NOT ENTITLED TO NOTICE TO QUIT before ejectment can be brought against him by the mortgagee. No tenancy of any kind is created by the mortgage.

ESTATE FOR YEARS BECOMES MERGED IN FEE when the fee is acquired by the tenant for years. The lease becomes extinct, and no person can thereafter claim under it.

MORTGAGEE MAY RESORT TO OTHER REMEDIES THAN SCIRE FACIAS AGAINST MORTGAGOR, when one or more of the installments of the mortgage debt are due and unpaid; although he cannot resort to the proceeding by *scire facias* until the last installment is due.

DEED AND MORTGAGE ARE PRESUMED TO BE BUT ONE TRANSACTION when they bear the same date, and are between the same parties.

EJECTMENT brought by the appellee, Charles Ballance, against the appellant, Charles R. Carroll. The plaintiff claimed to recover on a mortgage made by William Kellogg to Ballance, on November 5, 1855, to secure the payment of ten notes, one of which fell due each year, beginning April 1, 1857. The notes represented part of the purchase-money of the land in question, together with other land not claimed in this action, all of which had been conveyed by Ballance to Kellogg by a deed bearing the same date as the mortgage. Carroll claimed under Kellogg. The plaintiff had a verdict and judgment, and the defendant appealed. Further facts appear in the opinion.

N. H. Purple, for the appellant.

Charles Ballance, in propria persona.

By Court, BREESE, J. The questions presented by this record are, Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgaged premises in ejectment against the mortgagor, or those claiming under him, when one or more notes are due and unpaid, and without notice to quit to the party in possession, before action brought?

In England, and in many of the American states, it is

understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition: Coote on Mortgages, 339; *Blaney v. Bearce*, 2 Me. 132; *Brown v. Cram*, 1 N. H. 169; *Hobart v. Sanborn*, 13 Id. 226 [38 Am. Dec. 483]; *Northampton Paper Mills v. Ames*, 8 Met. 1.

And this right is fully recognized by courts of equity, although liable to be defeated at any moment, in those courts, by the payment of the debt. It has been held that this right cannot be restrained by a parol agreement that the mortgagor shall be allowed to remain in possession until forfeiture, for the reason that such an agreement is inconsistent both with the terms of the deed and the provision of the statute of frauds: *Colman v. Packard*, 16 Mass. 39.

So strict are the principles which obtain in such cases, and constantly applied in some states, that it is held that the rights of the mortgagee to the possession cannot be defeated by the tender, or even by the payment, of the debt, after the time fixed for its payment; for, by the old and rigid rule of covenants, the condition not having been performed at the day, the right of the mortgagor was gone at law, and the only redress for him was in equity.

By the common law, as enforced in the English courts, on the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner, of the land, and they so remain respectively, until the land is redeemed or the equity foreclosed. As a consequence of this, results the doctrine that the mortgagee may maintain ejectment against the mortgagor before condition broken, and turn him out of possession. To avoid this, most English mortgages contain a clause that until default made, the mortgagor, his heirs, etc., may hold and enjoy the land, and receive the profits, without interruption by the mortgagee or his heirs.

The interest of the mortgagee is regarded there and in many of the states as an estate, and may be conveyed by him to third persons by any of the usual modes of conveyance. Being a mortgagee in fee, it must follow that he has the legal title to the estate, and consequently the same right to transfer it by deed that he has to convey by deed the legal title of any other real estate, subject only to the right of redemption existing in the mortgagor: *Givan v. Doe ex dem. Tout*, 7 Blackf. 210.

In other states, holding the mortgagor to be the owner of the land, not only as against third persons, but as against the mortgagee, it is decided that a conveyance by the mortgagee, intended to pass the interest of the mortgagee as an estate, and not as a security merely for a debt due, would be wholly inoperative: *Wilson v. Troup*, 2 Cow. 195 [14 Am. Dec. 458]; *Jackson ex dem. Titus v. Myers*, 11 Wend. 533.

In *Jackson ex dem. Curtis v. Bronson*, 19 Johns. 325, which was an ejectment by the mortgagor against the assignee of the mortgagee, the court held that the mortgagee had a mere chattel interest, and the mortgagor must be considered the proprietor of the freehold. The mortgage is deemed a mere incident to the bond, or as security for the debt; and the assignment of the interest of the mortgagee in the land is a nullity.

In *Runyan v. Mersereau*, 11 Johns. 534 [6 Am. Dec. 393], it was held that the mortgagor, or a purchaser of the equity of redemption, may maintain trespass against the mortgagee, or against a person cutting wood under his license of the mortgaged premises. The freehold is in the mortgagor, and in an action of trespass by a mortgagor against a mortgagee, if the defendant pleads *liberum tenementum*, the plaintiff may reply that the freehold is in himself.

In *Gardner v. Heartt*, 3 Denio, 232, the court said a mortgage creates a specific lien on the land mortgaged, the same as a judgment duly docketed creates a general lien on the land of the judgment debtor. But the mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt, the title to the land, notwithstanding the mortgage, remaining in the mortgagor.

This court has held, in accordance with the rulings of the English courts of common-law jurisdiction, that as an incident to this ownership in the mortgagee, he can enter before condition broken or bring ejectment. He is considered the owner of the fee, having the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner: *Delahay v. Clement*, 3 Scam. 202; *Vansant v. Allmon*, 23 Ill. 33.

There seems, to one member of this court at least, great propriety in a distinction which might be made, though the books do not recognize it, between a mortgage executed for money loaned, or for the performance of some other obligation, where the consideration passes from a stranger to the owner of the land mortgaged, and a mortgage executed to secure the

payment of the purchase-money of the land itself, which are quite as common in the transactions of the day as those given on the actual loan of money. In the first class of cases, a mortgage may properly be regarded as an incident or security merely for the repayment of the money actually loaned, the lender never having had an interest in the land mortgaged as security.

A mortgage of the other description, given to secure the payment of the purchase-money of the land itself, ought to be regarded as something more than a mere security for money loaned, no money being in fact loaned. The vendor of land, by his deed, clothes his grantee with power to enter and take possession of the land, to grant it away to strangers, to deprive the vendor of all use of it. The mortgage is executed to secure the vendor in the purchase-money, on the promise of which, at a certain day, he surrenders the possession to the mortgagor. Now, different considerations operate upon the parties in these cases. In the first, the mortgagee only stipulates for a prompt return of his money; his only consideration is, that the security shall be ample; and it is, in practical life, rarely, if ever, understood by the parties to such a mortgage to pass the title in fee of the land to the mortgagee, so as to vest in him the power to enter on condition broken, or bring ejectment and turn the mortgagor out of possession. The debt may be very trifling in comparison to the value of the land mortgaged, and so long as its ultimate payment is fully secured, such mortgagee should be content with the usual remedies allowed him by the law—to proceed by *scire facias* under the statute, or by bill in equity for a strict foreclosure or for a foreclosure and sale, or by suit on the note, and thus receive the full benefit of what the parties intended should be security. In justice and equity, his principal right is to his money only.

In the other class of cases—and they are, perhaps, the most numerous in this state—something more than mere security must be in contemplation of both parties. The title to the fee ought not to be held as having passed absolutely out of the vendor. It is in him when he sells, and should be considered as passing out of him only by the payment of the purchase-money. There would seem to be great propriety in conceding to such a mortgagee all the rights the true owner of the fee can exercise—the right of entry, or the action of ejectment on condition broken, and not before. It is

his estate, the title to which he has never in fact parted with, except upon a condition which has not been performed. It is, then, but sheer justice that the possession should be restored to him.

But the law makes no distinction, and we can make none. The next question is, The mortgagor being in possession, is he entitled to notice to quit before suit brought?

This depends on the relation subsisting between the mortgagee and mortgagor, and this has never yet been specially defined or authoratively determined. The appellant's counsel contends that he is a tenant from year to year. We think no court has gone so far as to say that. The relation is admitted to be *sui generis*, and altogether anomalous. What the true relation is, has been much discussed. He has been called tenant at will, *quasi* tenant at will, tenant at sufferance, agent, receiver, yet wanting in some of the essentials of each. He has never been considered a tenant from year to year, except as it may be so inferred from the cases cited from New York—*Jackson ex dem. Benton v. Laughhead*, 2 Johns. 75, especially, which is the leading case. Judge Livingston, who delivered the opinion in that case, said that it was not deemed necessary to ascertain what relation the mortgagor held to the mortgagee, whether as tenant at sufferance or at will, or from year to year. That as a rule of practice, the court will require, in such cases, a notice of six months; and that decision has been followed since: *Jackson ex dem. Bennet v. Lamson*, 17 Id. 300.

The doctrine in England is, as we find it declared by Lord Mansfield, in the case of *Keech v. Hall*, Doug. 21, that when the mortgagor is left in possession, the true inference to be drawn is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases.

And in *Thunder v. Belcher*, 3 East, 449, Lord Ellenborough held that a mortgagor was no more than a tenant at sufferance, not entitled to notice to quit. In most of the American courts this doctrine is recognized: *Brown v. Cram*, 1 N. H. 169; *Newall v. Wright*, 3 Mass. 138 [3 Am. Dec. 98]; *Colman v. Packard*, 16 Id. 39; *Reed v. Davis*, 4 Pick. 216; *Blanney v. Bearce*, 2 Me. 132; *Welch v. Adams*, 1 Met. 494; *Shute v. Grimes*, 7 Blackf. 1; *Lyman v. Mower*, 6 Vt. 345.

One good criterion of the nature of a mortgagor's interest is

found in the case of *Keech v. Hall*, Doug. 21, and recognized in the case of *Jones v. Thomas*, 8 Blackf. 428, and that is, that the mortgagor cannot take the emblements, even when expelled, without warning by the mortgagee, as a tenant at will could. This being so, he cannot be regarded as a tenant at will, and the decisions which put his possession on that footing cannot be correct, for although the mortgagor holds the premises by the suffrage of the mortgagee, yet he does not hold of him, and as the peculiar relation of tenure is not created, the mortgagor cannot properly be described as a tenant at will: *Mayo v. Fletcher*, 14 Pick. 530.

The point has never come directly before this court for a decision. We are inclined to the opinion that there is really no tenancy of any kind created by the mortgage. The mortgagee may consider the mortgagor as his tenant for some purposes, or a trespasser, or person holding without right. It is an inference from the facts and circumstances. He is not such a tenant as to be entitled to a notice to quit. The only case decided by this court bearing on this point, is the case of *Prentice v. Wilson*, 14 Ill. 91.

It is there held as a general principle, where a party acquires the possession of land under an executory contract to purchase, the vendor cannot maintain ejectment against him until he has demanded possession or given him notice to quit; but if he repudiates the contract under which he obtained the possession, or fails to comply with its terms, the seller is at liberty to treat the contract as rescinded, and regain the possession by an action of ejectment; a demand of possession, or notice to quit, being, in such case, unnecessary.

As to the other points made by the appellant, that he was in possession under a lease, theretofore executed by the appellee, it appeared in evidence that the premises were, many years previous to the suit, leased by the appellee to one Cole, who assigned to Thompson, and he to one Gregg, and he to Kellogg, who afterwards purchased the fee and executed the mortgage. The lease, then, being owned by Kellogg, merged in the deed of the fee to him, and no person thereafter could claim under that lease: it was extinct.

As to the fourth point, that the appellee had violated his contract and broken his covenants, this is attempted to be made out, by showing that portions of the land conveyed to Kellogg, and included in the same mortgage, were recovered by other adverse parties in ejectment in the United States cir-

cuit court. This recovery did not affect the land sued for; it was neither part nor parcel of it, and has not any connection with these premises for which this suit was brought, nor does it appear from the evidence that there was any complaint made on that account, when Webb, as agent of appellee, demanded payment of the notes.

The statute to which appellant refers under the first point he makes, that a mortgage cannot be foreclosed until the last installment is due, means only that the mortgagee cannot resort to the proceeding by *scire facias* until the last installment is due. It does not debar him from resorting to other remedies. He may proceed personally against the debtor, on the note, and subject his general property to the judgment; or he may bring ejectment on condition broken, or make peaceable entry, or file a bill in chancery for a strict foreclosure, for a foreclosure and sale, or if he prefers it, sue out a *scire facias*. The remedies are various and concurrent or successive, as may be deemed proper.

We think it is settled that a mortgagee may maintain ejectment, on condition broken, without notice to quit, and that the condition is broken when one or more installments are due and unpaid; because, the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition.

On the other point made by appellant, the presumption must obtain, inasmuch as the deed and mortgage bear one and the same date, that they are but one transaction. The judgment must be affirmed.

Judgment affirmed.

MORTGAGE CONVEYS LEGAL TITLE TO MORTGAGEE, IN SOME STATES: *Patterson v. Carneal*, 13 Am. Dec. 208; *Hunt v. Hunt*, 25 Id. 400; *Chamberlain v. Thompson*, 26 Id. 390; *Jamieson v. Bruce*, Id. 557; *Drayton v. Marshall*, 33 Id. 84; *Hobart v. Sanborn*, 38 Id. 483; *Smith v. Kelley*, 46 Id. 595; *Savage v. Dooley*, 73 Id. 680; and see *Frische v. Kramer's Lessee*, 47 Id. 368; but in other states, it is regarded as a mere security for a debt, and not a conveyance: *Waring v. Smyth*, 47 Id. 299, and prior cases in note; *Hall v. Sawicki*, 54 Id. 485; *Godeffroy v. Caldwell*, 56 Id. 360; *Burke v. Cruger*, 58 Id. 102; *Duty v. Graham*, 62 Id. 534; *Peters v. Jamestown Bridge Co.*, 63 Id. 134; *McMillan v. Richards*, 70 Id. 655; *Wood v. Trask*, 76 Id. 230; *Goodenow v. Ewer*, Id. 540; *Johnson v. Sherman*, Id. 481. The principal case has been cited to the point that a mortgagee of land is the owner of the fee, as against the mortgagor and all persons claiming under him, in *Nelson v. Pinegar*, 30 Ill. 481; *Kellogg v. Wood*, 64 Id. 347; *Oldham v. Pfleger*, 84 Id. 104; *Higgs v. Collins*, 2 Biss. 277; and see it referred to in *Fletcher v. Holmes*, 32 Ind. 529, per Fraser, J., on the distinction which might be made between a mortgage for purchase-money, and one

not for purchase-money, by which the former should be held to confer greater rights than the latter upon the mortgagee, as against the mortgagor.

MORTGAGEE MAY MAINTAIN EJECTMENT against the mortgagor, or those claiming under him, in some states: *Chamberlain v. Thompson*, 26 Am. Dec. 300; *Drayton v. Marshall*, 33 Id. 84; or a writ of entry: *Hobart v. Sanborn*, 38 Id. 453; but not in other states: *Morris v. Mowatt*, 22 Id. 661; *Swart v. Service*, 34 Id. 211; *Duty v. Graham*, 62 Id. 534. The principal case is cited to the point that he may maintain ejectment, in *Kelgour v. Wood*, 64 Ill. 347; *Oldham v. Pfeiffer*, 84 Id. 104; *Riggs v. Collins*, 2 Biss. 277; and in *Nelson v. Pfeiffer*, 30 Id. 481, to the point that he is entitled to all the rights and remedies which the law gives to the owner of land; and he is therefore entitled to an injunction to stay waste on the premises.

MORTGAGOR IN POSSESSION IS NOT ENTITLED TO NOTICE TO QUIT before ejectment can be brought against him by the mortgagee: Note to *Stedman v. Mcintosh*, 42 Am. Dec. 135, where the subject is discussed; *Chapman v. Glascock*, 48 Id. 41; *Jackson v. Warren*, 32 Ill. 340, citing the principal case; and see *Glascock v. Roberts*, 55 Am. Dec. 106; *Kilburn v. Ritchie*, 56 Id. 326; although the principal case is also cited in *Fraser v. Gates*, 61 Ill. 183, and *Jackson v. Warren*, 32 Id. 340, to the effect that a mortgagee may consider the mortgagor in possession as his tenant for some purposes.

REMEDY BY SCIRE FACIAS ON MORTGAGE DOES NOT EXCLUDE REMEDY BY EJECTMENT: *Martin v. Jackson*, 67 Am. Dec. 489.

DEED AND MORTGAGE, WHEN PARTS OF ONE TRANSACTION: See *Newbegin v. Langley*, 63 Am. Dec. 612; *Lassen v. Vance*, 68 Id. 322.

MERGER OF ESTATES IN REALTY: See *Moore v. Lucas*, 72 Am. Dec. 629, and note collecting prior cases; and see also *Childs v. Clark*, 49 Id. 164.

GRISWOLD v. TRUSTEES OF PEORIA UNIVERSITY.

[26 ILLINOIS, 41.]

SUBSCRIPTION IN AID OF CORPORATION NOT YET FORMED INURES TO BENEFIT OF CORPORATION thereafter created.

INSTRUMENT IN WRITING, UPON WHICH ACTION IS BROUGHT, IS ADMISSIBLE IN EVIDENCE, whether it be the original or not, if its execution is admitted, by not being denied by affidavit, as required by the statutes of Illinois.

SUBSCRIPTION IN AID OF CORPORATION, IN EXISTENCE OR CONTEMPLATION, MAY BE RECOVERED in an action for money paid, laid out, and expended, if the corporation incurs expense and liability on the faith of the subscription.

ACTION to recover a subscription in aid of a corporation made before its charter was obtained. The plaintiffs had a verdict and judgment. The facts are sufficiently stated in the opinion.

M. Williamson, A. McCoy, John D. Rouse, and C. C. Bonney,
for the appellant.

Manning and Merriman, for the appellees.

By Court, BREESE, J. There are really but two questions presented in this record. The first is, Was the subscription binding upon the defendant below, being made before the charter of the university was obtained? And second, If binding upon him, was it evidence?

Upon the first point, it has been often decided, and may be now considered as settled, that such a subscription inures to the benefit of the corporation thereafter created. English and American cases to this point are collected and referred to by this court in the case of *Cross v. Pinckneyville Mill Co.*, 17 Ill. 58. It is unnecessary to go over the argument of these cases. As to the other question, the record shows that the suit was brought upon an instrument in writing purporting to be a subscription paper, with the name of the defendant thereon, as a subscriber to the amount of six hundred dollars.

This paper was offered in evidence on the trial, and was the only evidence of the contract.

It was objected to, because: 1. There is no such corporation as the plaintiff; 2. No assessment proved; 3. It is not payable to the plaintiff; 4. No payee mentioned in the instrument; 5. No consideration for the agreement; 6. The instrument not appearing to be signed by the defendant, and appearing on its face to have been altered since signed. This last reason seems to be *felo de se*.

The suit having originated before a justice of the peace, and brought into the circuit court by appeal, there were no pleadings in writing, but the plaintiff will be presumed to have averred in the verbal statement of his case that the writing was signed by the defendant, and that the suit was brought upon it. The law in such cases is plain and positive. No person shall be permitted to deny on trial the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, unless the person so denying the same shall, if defendant, verify his plea by affidavit: *Scates's Comp.*, c. 85, p. 254. Whether this was a copy of a copy, or the original, makes no difference. The suit was brought upon it, and its execution not being denied, it was evidence.

The act of the general assembly incorporating the plaintiffs, under the name of the Peoria University, was produced without objection. The proof shows that the university was under the synod of Illinois, and if that corporation incurred liabilities

on the strength of the defendant's subscription as well as that of others, a suit as for money paid, laid out, and expended would lie against them. They had a right to become the payees and sue as such. This was decided by this court at the last term at Springfield, in the case of *Pryor v. Cain*, 25 Ill. 292, in conformity with the current of decisions on that point. In such cases, the contemplated company or college under the synod of Illinois, to be located at Peoria, is a proper promisee, and the promise of the subscriber is good to them as a third person, who, on the faith of it, had incurred expense and liabilities; and there is mutuality also in the stock, dividends, and general interests of the company, to which the subscriber became entitled: *Hamilton and Deansville Plank Road Co. v. Rice*, 7 Barb. 157.

Though this subscription was to be paid as the money should be required, to meet the expenditures incurred in putting in operation the college, there is abundant evidence to show that this money was required to meet liabilities. The defendant cheerfully paid one half, being three hundred dollars of his subscription, but the building having been blown down, he refused to pay the other half. It is in proof that beside this subscription of six hundred dollars, the defendant had subscribed originally for but three hundred dollars, and for six or seven scholarships, valued at three hundred dollars each. The defendant was released from his scholarships, on his raising his subscription to six hundred dollars, and though no assessments were made, this release is a waiver of assessments, and is a good consideration for the remaining three hundred dollars, for which the plaintiffs obtained judgment.

It is evident the plaintiffs have incurred large liabilities on the faith, in part, of defendant's subscription, and he ought in all justice to pay it.

We see no error in the instructions of the court. Those refused, which were asked by the defendant, the court could not well give without stultifying itself. The judgment of the court is affirmed.

Judgment affirmed.

SUBSCRIPTION IN AID OF CORPORATION OR ASSOCIATION NOT YET FORMED
INCURS TO ITS BENEFIT WHEN CREATED: See *Chester Glass Co. v. Dewey*, 8
Am. Dec. 128; *Phipps v. Jones*, 59 Id. 708; *Anderson v. Newcastle etc. R. R.*,
74 Id. 218; but see *Phillips Academy v. Davis*, 6 Id. 162. The principal case
is cited in *Stone v. Great Western Oil Co.*, 41 Ill. 98, to the point that a sub-
scription to the stock of a company, in contemplation of its becoming incor-

porated, to accomplish any legitimate object, is a valid contract between the parties, supported by a sufficient consideration; and in *Willard v. Trustees of Methodist Episcopal Church*, 66 Id. 56, to the point that an organization in fact and user under it proves the existence of a corporation for the purposes of a suit by it on a subscription prior to such organization, notwithstanding the plea of *not a corporation*.

RECOVERY MAY BE HAD UPON SUBSCRIPTION after work has been done or expense incurred upon its faith: *Hopkins v. Updegr*, 70 Am. Dec. 375, and note collecting prior cases. The principal case is cited to this effect in *Miller v. Ballard*, 46 Ill. 379; *McClure v. Wilson*, 43 Id. 361, 362; *Trustees of Kentucky Baptist Ed. Soc. v. Carter*, 72 Id. 249.

IVERSON v. LOBERG.

[26 ILLINOIS, 179.]

IF PETITION BY ADMINISTRATOR FOR SALE OF REAL ESTATE STATES ENOUGH TO REQUIRE COURT TO ACT, the orders and decisions of the court in the premises are binding until reversed, and cannot be attacked collaterally.

EJECTMENT by Edward, Charlotte E., and Albert Iverson, children and heirs of Halver Iverson, to recover certain lots owned by their father at the time of his death. Iverson died intestate, August 15, 1850. On September 17, 1850, Nels Olsne was appointed guardian of Charlotte E. and Albert Iverson, and on the day following, Olsne was appointed administrator of the estate. On January 10, 1851, the administrator presented an inventory and appraisal bill, fixing the value of the personal property of the estate at one hundred and sixty-seven dollars and seventy-four cents; and on the same day he presented a sale bill, showing that on October 17, 1850, he had sold all the personal property for one hundred and seventy-two dollars and fifty cents. Claims to the amount of seventy dollars and twenty-three cents were allowed at the same date, and on September 8, 1851, a claim of thirty-three dollars and sixty-seven cents was also allowed; these being all the claims allowed against the estate. The administrator had also paid thirty-eight dollars and sixty-seven cents as expenses of administration. On September 20, 1852, an appraiser's bill was filed, appraising certain articles allowed to the family of the deceased at three hundred and forty-two dollars and fifty cents, and on October 9, 1852, an order was made awarding that sum to the family. On September 23, 1852, the administrator presented his petition to the county court of Cook county, setting forth that there were no available dues or demands, personal property, effects or assets, belonging to the estate, so far as known.

to the petitioner, and that he had found the sum of two hundred and twenty-five dollars, or thereabouts, still standing against the estate, which, by the order of the court, ought to be paid, but which the petitioner was unable to pay, for want of property subject to his control. All the children were minors at the time, and there was nothing to show that a guardian *ad litem* had been appointed, except that it appeared that one Edward S. Kimberly, guardian *ad litem* for — filed his answer on behalf of the minors, neither admitting nor denying the allegations of the petition, but reserving the rights of the minors by requiring proof, etc. The sale was ordered, it being recited that it appeared from the records of the court that the administrator had filed his inventory and appraisement bill of the effects of the deceased, but no sales bill, because there were no personal effects; that there were claims against the estate unsatisfied; that it was necessary to sell the real estate to pay the debts; and that legal notice of presenting the petition had been given. The sale was made to one Page for one thousand two hundred and eighty dollars, and afterwards confirmed, on December 17, 1853. Page received an administrator's deed in due form, and subsequently conveyed the lots to the defendant. On June 8, 1858, the administrator rendered an account, and produced vouchers, from which it appeared that a portion of the claims against the estate, amounting to a fraction over fifty-six dollars, was paid before the petition for the sale of the real estate was presented. There was nothing, further than the above, showing that the administrator had presented an account of the personal estate and debts of the deceased. The plaintiffs objected to the administrator's deed, and to all the proceedings of the county court, in regard to the petition for sale, on the ground that the court had no jurisdiction, and the proceedings were void, because it did not appear by the petition that the administrator had filed an inventory, appraisement bill, or sales bill, or that he had first applied the personal estate towards the payment of the debts of the intestate; because no guardian *ad litem* was appointed for the minors, nor were they in any way made parties thereto; because it did not appear by the petition that the personal estate was insufficient to pay the just claims against the decedent's estate, and it affirmatively appeared from the agreed statement of facts that the personal estate was sufficient to pay all such claims; and because the administrator, previous to obtaining the order of sale, failed to make a

just and true account or any account of the personal estate and debts of the decedent. The objections were overruled, the deed admitted, the proceedings of the county court sustained, and judgment rendered for the defendant. The plaintiffs excepted, and appealed.

J. S. Page, for the appellants.

Farwell, Smith, and Thomas, for the appellee.

By Court, CATON, C. J. We are obliged to affirm this judgment, much against our inclination. This sale was, no doubt, a great outrage, and we should, as at present advised, not hesitate to reverse the proceeding were it directly before us. But here it comes up collaterally, and we cannot disregard that proceeding unless it was void for the want of jurisdiction. We cannot hold that such was the case. The petition stated enough to require the court to act in the premises—to set it in motion, and that was sufficient to give the court jurisdiction, and whatever was done under it was not in the exercise of a usurped power, but of one conferred by law; and although the court may have exercised that power erroneously, its orders and decisions are binding till reversed. If we are to look into any errors in that proceeding, it must be brought before us by writ of error.

The judgment must be affirmed.

Judgment affirmed.

DECISIONS AND ORDERS OF PROBATE COURTS, WHEN WITHIN JURISDICTION, ARE CONCLUSIVE, until reversed or vacated, and cannot be collaterally attacked, however erroneous or irregular: *Doe ex dem. Saltonstall v. Riley*, 63 Am. Dec. 334, and prior cases in note; *Field's Heirs v. Goldsby*, Id. 341; *Singerly v. Swain's Adm'rs*, 75 Id. 581; *Stuart v. Allen*, 76 Id. 551. Thus, the settlement of a guardian or administrator cannot be set aside or opened up, except by a direct proceeding: *Barnes v. Bartlett*, 47 Ind. 104; and *ex parte* orders made in the settlement of an estate, previous to the final settlement, cannot be attacked collaterally: *Parsons v. Milford*, 67 Id. 499; nor are *ex parte* orders and partial reports, in relation to the duties of guardians, subject to collateral attack: *Candy v. Hanmore*, 76 Id. 129. The principal case is cited in the foregoing Indiana cases.

JUDGMENT OF COURT HAVING JURISDICTION CANNOT BE COLLATERALLY ATTACKED, no matter how erroneous the decision or proceedings. The principal case is cited to this general proposition in *Goudy v. Hall*, 36 Ill. 319; *Mulford v. Statzenback*, 46 Id. 308; *Feaster v. Fleming*, 56 Id. 460; *Hobson v. Ewan*, 62 Id. 154; *Bryant v. Ballance*, 64 Id. 189.

PETITION BY ADMINISTRATOR FOR SALE OF REAL ESTATE IS SUFFICIENT if it states enough to require the court to act: *Hobson v. Ewan*, 62 Ill. 154, citing the principal case.

HALE v. BARRETT.

[26 ILLINOIS, 195.]

LIEN DOES NOT EXIST ON GOODS OF ONE FOR FREIGHT AND CHARGES ON GOODS OF ANOTHER, shipped by the same bill of lading to the same consignee.

LIEN FOR FREIGHT AND CHARGES IS LOST IF GOODS ARE DELIVERED TO CONSIGNEE, upon his note therefor, and is not revived if the carrier or his agent afterwards accidentally obtains possession of them.

TROVER for a lathe. The plaintiffs, Barrett & Cutting, of Massachusetts, shipped a lathe to James Kendall, of Chicago, to be sold on commission; and at the same time, and by the same bill of lading, Ball & Ballard, of Massachusetts, shipped several packages of merchandise to Kendall. The property was received at Chicago by the defendants, Hale & Co., who were warehousemen and agents of the propeller, which brought it to Chicago, and was by them delivered to Kendall, who gave his note for the charges in gross. After the note was given, Kendall's clerk, Prouty, without the knowledge or consent of Kendall, gave Hale & Co. a warehouse receipt for the goods. The goods remained in Kendall's possession until he went out of business, and gave up his store at the expiration of his lease, when they came into the defendants' hands by Hall's taking possession of the store as landlord. Subsequently the plaintiffs demanded the lathe, and offered to pay the freight and charges on it, but the defendants refused unless the freight and charges on the packages sent by Ball & Ballard were also paid. The court instructed the jury, among other things, that the freight and charges on goods belonging to other persons were never any lien upon the lathe, if it belonged to the plaintiffs; and that if the defendants had a lien upon the lathe for any freight and charges, they lost it by taking Kendall's note therefor; and they could not afterwards take the lathe and hold it as security for such freight and charges, without the plaintiffs' consent, if the plaintiffs owned the lathe. There was a verdict and judgment for the plaintiffs. The defendants appealed.

Hoynes, Miller, and Lewis, for the appellants.

Van Buren and Gary, for the appellees.

By Court, CATON, C. J. If the principle laid down by the court in the instructions is correct, that ends the case at once. This lathe, with several other packages, was received by the

defendants as warehousemen and agents of the propeller which brought them to Chicago. All were consigned to Kendall by one bill of lading, with a gross charge for all, but they were shipped by two different consignors, the plaintiff in this action having shipped the lathe, and another party the other packages. The defendants claimed to hold the lathe for the charges on the whole goods, and refused to deliver it, without payment of the full amount. If this was an illegal claim, then the defendants held the lathe illegally after it was demanded, and the plaintiff was not bound to go through the useless ceremony of tendering the actual amount due. He had not the same means of knowing what was the amount due, which the defendants had.

We are satisfied the court laid down the correct rule of law on this subject. Had all the goods belonged to the same party, and had they been shipped at the same time, under one bill of lading, and to the same consignee, quite a different question would be presented. But here the goods belonged to different parties, who evidently shipped them separately. How they happened to get into one bill of lading is not explained, nor is it very material to know. There is no evidence that the plaintiff ever consented that his lathe should be held for charges due on other goods from another party; and without his consent, no such burden could ever be thrown on him.

And so, too, was the court right in its rulings as to the release of the lien, if the goods were delivered to Kendall, the consignee, upon his note for the freight, nor was the lien revived when the lathe came into their hands when Kendall left the store on the expiration of his lease, and one of the defendants took possession, as landlord.

We are satisfied with the law as laid down by the court, and with the verdict of the jury, and are of opinion that the judgment should be affirmed.

Judgment affirmed.

COMMON CARRIER HAS LIEN FOR FREIGHT: See *Newhall v. Faroux*, 33 Am. Dec. 617; *Walker v. Cassaway*, 50 Id. 551; *Frothingham v. Jenkins*, 52 Id. 286; *Ames v. Palmer*, 66 Id. 271; but no lien exists unless the relation of debtor and creditor exists between the owner and carrier: *Fitch v. Newberry*, 40 Id. 33; and see *Robinson v. Baker*, 51 Id. 54. Where the master of a vessel takes, in payment of freight, a bill of exchange drawn by the consignee on the consignor, who is the owner of the goods, and the bill is by him dishonored, such owner is not released from his original liability: *Grant v. Wood*, 47 Id. 162.

WAREHOUSEMAN'S LIEN: See *Steinman v. Wilkins*, 42 Am. Dec. 254, and note; *Priddle v. Kent*, 71 Id. 327.

COMMON-LAW LIENS DEPEND ON POSSESSION, and are gone when possession is gone: *Miller v. Marston*, 56 Am. Dec. 694, and note collecting prior cases; *Donald v. Hewitt*, 73 Id. 431.

THE PRINCIPAL CASE IS CITED IN *Northern Transportation Co. v. Sellick*, 82 Ill. 253, to the point that if one person has the property of another in his possession, and the owner makes a demand for it, and the one in possession, without right, refuses to deliver it, that will constitute a conversion of the property by the latter to his own use.

PRIESTLY v. NORTHERN INDIANA AND CHICAGO RAILROAD COMPANY.

[25 ILLINOIS, 205.]

MEASURE OF DAMAGES IN ACTION AGAINST COMMON CARRIER FOR FAILURE TO DELIVER MACHINERY TRANSPORTED, within a reasonable time, is the value of its use during the time it was improperly detained.

SPECIAL DAMAGES FOR FAILURE OF COMMON CARRIER TO DELIVER MACHINERY TRANSPORTED, within a reasonable time, may be recovered, under proper notice and allegations.

CASE against the railroad company, as a common carrier, to recover damages for failure to deliver, within a reasonable time, machinery of the value of two thousand dollars, which the plaintiffs ordered for immediate use in their business. The machinery was sent from Toledo to the plaintiffs, at Chicago, on March 28, 1854, but it was not delivered until the latter part of May. The plaintiffs recovered one dollar as damages. Further facts appear in the opinion.

A. W. Windett, for the plaintiffs in error.

Glover, Cook, and Campbell, and Blodgett and Winston, for the defendant in error.

By Court, **BREESE, J.** The question in this case arises upon the instructions given by the circuit court on the trial, to which plaintiffs excepted. The court, after giving certain instructions for the plaintiffs, and refusing others, gave of its own motion the following: "If the jury find for plaintiffs, the true and only measure of damages is the difference in the market value of the machinery in question, in Chicago, at the time it arrived, and the time when it should have arrived; and if the jury shall find no evidence on this subject has been given from which any judgment can be formed, the plaintiffs are entitled to nominal damages only."

The fourth instruction given on motion of the defendants, is but a corollary from this one volunteered by the court, and the decision upon that disposes of both. The principle announced by the court in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment, that under a contract to deliver in a reasonable time valuable machinery such as described in the declaration, that the difference in the market value of such machinery at the time it was in fact delivered, and when it should have been delivered, is all the damage the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to carriers to perform, promptly, a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, as grain, live-stock, and such like, this rule is doubtless the true one, and has been recognized by this court, in the case of *Sangamon and Morgan County R. R. Co. v. Henry*, 14 Ill. 156.

Where the property to be carried and delivered is not of a perishable nature, and is not a common or ordinary object of sale in market, and subject to its fluctuations, but is designed for a special purpose in a special business, the rule is very different; but in both cases adequate indemnity should be offered the plaintiff for the loss he has sustained. In the first class of cases, the rule established in the case of *Sangamon and Morgan County R. R. Co. v. Henry*, *supra*, affords such indemnity. In the other class, the true rule is laid down in *Green v. Mann*. 11 Id. 613, which was an action for a failure to put certain additional machinery into a mill, which the plaintiff had rented of the defendant's intestate. This court say: "The true measure of damages in this case was the value of the use of that portion of the machinery which Stadden had contracted to furnish, and which, by reason of his failure to do, Mann was unable to enjoy."

In this case, the inquiry should have been, What was the value of the use of such machinery in such a factory for the time it was detained? In other words, what was a reasonable rent for it? For what sum could plaintiffs have hired equal machinery of that description?

As this is an action on the case for a wrong done, had the plaintiffs notified the defendants for what purpose they designed the machinery, and the circumstances of their necessi-

ties, they might have brought forward other topics and elements of damage, such as they attempted to show on the trial—that a large number of hands were, of necessity, under pay and idle; loss of promised custom, out of which profits would have been made. In the absence of notice, proof of this kind was properly rejected.

If, also, the plaintiff had alleged in his declaration that he had made valuable contracts, to be executed with this machinery, which would have yielded him profits, the jury, though they would not be bound to adopt any specific contract that may have been made, yet if reasonable evidence is given that the amount of profit would have been made, as claimed, the damages might be assessed accordingly: *Per* Baron Alderson, in *Waters v. Towers*, 20 Eng. L. & Eq. 412.

For the errors we have noticed, the judgment of the circuit court is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

Judgment reversed.

MEASURE OF DAMAGES IN ACTION AGAINST COMMON CARRIER FOR DELAY IN DELIVERING FREIGHT: See *Galena etc. R. R. v. Rae*, 68 Am. Dec. 574. In an action against a common carrier for negligently delaying the delivery of machinery intrusted to him, the value of the use of the machinery in such a factory as that for which it was designed, for the time it was detained, may be recovered: *Chicago etc. R. R. v. Hale*, 83 Id. 363; *Benton v. Fay*, 64 Id. 421, citing the principal case as holding this proposition; but in an action against a common carrier for injuries to or delay in delivering chattels, special damages cannot be recovered, unless it is averred and proved that the carrier was informed of the intended use of the chattels: *Id.*

DE WOLF v. STRADER.

[26 ILLINOIS, 225.]

RELATION OF ATTORNEY AND CLIENT IS NOT CONSUMMATED without a retainer or fee paid.

ATTORNEY EMPLOYED MERELY AS SCRIVENER TO DRAW UP DEED IS COMPETENT TO TESTIFY concerning what comes to his knowledge in connection with the transaction.

DEED ABSOLUTE ON ITS FACE WILL BE CONSIDERED AS MORTGAGE, as to other creditors, if given to secure a pre-existing debt.

BILL in chancery, filed in the Kane circuit court. The bill charged that on October 20, 1848, the defendant Strader was largely indebted to the complainant and others; that on that day, he conveyed certain lands owned by him to his step-son,

the defendant Jones, by a deed reciting a consideration of two thousand dollars; that in fact the deed was without consideration, or if any consideration was paid, it was much less than the value of the property; that the deed was made with the intent to hinder, delay, and defraud creditors; and that in April, 1849, the complainant obtained a judgment against Strader, under which the lands were sold, and the complainant received the sheriff's deed therefor. The bill also alleged that the complainant was informed that Strader had received about two hundred dollars, due Jones under his father's will, and if that be so, the complainant offered to pay the same to Jones. Jones, in his answer, denied the fraudulent making of the deed, and alleged that Strader had received about two thousand dollars, which had been bequeathed to Jones by his father, and given to him by his grandfather. On the trial, one Barry, an attorney at law, who had been employed by Jones merely to draw up the deed from Strader, was examined as a witness by the complainant concerning communications made to him by Jones, as to the necessity for drawing up the deed. Portions of Barry's testimony were stricken out. The bill was dismissed, and the complainant sued out a writ of error.

Scates, McAllister, and Jewett, for the plaintiff in error.

W. D. Barry, for the defendants in error.

By Court, BRESEE, J. The principal question in this case is, chiefly, as to the admissibility of Mr. Barry as a witness against the defendants in error. When giving his testimony, he made no objection that he was their counsel, nor did he claim the privilege of his clients, but voluntarily stated all he knew of the transaction, as communicated to him by the defendants. He now claims the privilege of his clients, and contends he was their counsel when the disclosures were made. It does not appear that such a relation did in fact exist at the time Mr. Barry wrote the deed or had the conversations. There is no retainer shown, or offer to retain, or fee paid. This, and this only, can consummate that relation. The weight of evidence is, clearly, that Mr. Barry was acting as scrivener merely to draw a deed. He was not consulted as counsel, or asked for a legal opinion on a state of facts, but to draw a deed, the necessity for which was freely communicated by the defendant Jones.

A case directly on this point is found in 14 Pick. 416,

Hatton v. Robinson [25 Am. Dec. 415], in which it was held that when an attorney at law was requested by a debtor to draw up a mortgage deed of his personal property, and the debtor disclosed his purposes in making such a conveyance, either without any particular motive or in order to remove any scruple the attorney might have had as to the character of the transaction, but no legal advice was asked or given—it was held that the testimony of the attorney, as to such communications, was admissible.

There can be but one opinion about this deed, unless it shall be shown a *bona fide* indebtedness existed to Jones, and then it would be considered as a mortgage to secure Jones in the payment of his debt, asserted to be due from Strader to him. If Jones was a *bona fide* creditor of Strader, then the deed ought to have the effect of a mortgage, though absolute on its face. If Jones was not such creditor, then the conveyance was fraudulent and void, as designed to hinder, delay, and defraud creditors.

The cause will be remanded to the Kane circuit court, with directions to refer it to the master in chancery, who will ascertain the amount actually and *bona fide* due Jones from Strader, at the time of the execution of the deed by Strader to Jones, and if any *bona fide* indebtedness shall be found to exist, and anything shall be found due, upon proper proof being made, then the deed will be decreed by the circuit court to be a mortgage, and it will stand as such for the amount proved. If nothing shall be found due at that date, then the deed will be adjudged fraudulent and void as against *bona fide* creditors.

Decree reversed.

COMMUNICATIONS TO ATTORNEY ARE PRIVILEGED ONLY WHEN ACTING AS SUCH: *Hatton v. Robinson*, 25 Am. Dec. 415; *Thompson v. Kilborne*, 67 Id. 742; *Allen v. Harrison*, 73 Id. 302; *Hunter v. Watson*, Id. 543. Communications made to attorney, employed simply to draw up a deed or mortgage, are not privileged: *Hatton v. Robinson*, *supra*; and see *Coveney v. Tannahill*, 37 Id. 287; *contra*: *Parker v. Carter*, 6 Id. 513; *Bank of Utica v. Mersereau*, 49 Id. 189. The principal case is followed in *Smith v. Long*, 106 Ill. 488, on the point that an attorney who is merely employed to draw up the necessary papers to consummate a contract to which the parties had agreed, no legal advice being asked or required, is not privileged, and may testify as to what comes to his knowledge in connection with the transaction.

DEED ABSOLUTE ON ITS FACE IS MORTGAGE, IF INTENDED TO SECURE EXISTING DEBT: *Dabney v. Green*, 4 Am. Dec. 503; *Dunham v. Dey*, 8 Id. 282; *Edrington v. Harper*, 20 Id. 145; *Swart v. Service*, 34 Id. 211; *Nichols v. Reynolds*, 36 Id. 238; *Moore v. Madden*, 46 Id. 298; *Bigelow v. Topliff*, 60 Id. 264; *Baxter v. Dear*, 76 Id. 89; and parol evidence is admissible to show that the

conveyance was intended as a mortgage: *Swart v. Service*, *supra*, and note collecting prior cases; *Moore v. Madden*, 46 Id. 298; *Hall v. Sawell*, 54 Id. 485; *Johnson v. Sherman*, 76 Id. 481; *Anding v. Davis*, 77 Id. 658; but see *Bryant v. Crosby*, 58 Id. 767; but the evidence must be clear and satisfactory: *Corbit v. Smith*, 71 Id. 431, and note. The principal case is cited in *Susphen v. Cushman*, 35 Ill. 195, to the point that in it parol evidence was received to establish an existing debt, on account of which the conveyance was made: See the principal case distinguished in *Taintor v. Keys*, 43 Id. 336, in holding a transaction to be a purchase and sale, and not a mortgage.

THE PRINCIPAL CASE WAS DISTINGUISHED in *School Directors v. Trustees of Schools*, 66 Ill. 250, in holding that where an attorney appeared in open court, and argued a motion to dissolve an injunction, a retainer might be inferred, and it would have to be rebutted before the presumption would be overcome.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. DEWEY.

[26 ILLINOIS, 255.]

TO AUTHORIZE RECOVERY AGAINST RAILROAD COMPANY FOR INJURIES TO PERSON THROUGH NEGLIGENCE, it is not enough to simply show that the company was negligent, but it must appear that the injured person was not also guilty of negligence in some degree comparable to that of the company.

RECOVERY FOR INJURIES THROUGH NEGLIGENCE CANNOT BE HAD if both parties are negligent, and each is equally at fault; although it is otherwise if the negligence of the injured party is but slight, and that of the other gross.

ADULT IS GUILTY OF SUCH NEGLIGENCE AS WILL DEFEAT RECOVERY against a railroad company for injuries, where he attempts in the night-time, when he would not probably be seen by the engineer or conductor, to get to a passenger train by passing through a freight train, which he knew was ready to move at any moment.

CASE by Nancy M. Dewey, as administratrix of the estate of her husband, to recover damages for his negligent killing by the railroad company. The decedent, on the night of the accident, went to the defendant's depot at Princeton to take passage to Mendota, on the train which left the station after midnight. In attempting to get to the passenger train on the main track, by passing through a freight train, standing with the engine attached and steam up on a side-track between the ticket-office and the passenger train, he was caught between the bumpers, and killed. The plaintiff had a verdict, and the defendant appealed.

Walker, Van Arman, and Dexter, for the appellant.

J. H. Mayborne, for the appellee.

By Court, WALKER, J. We only deem it necessary in this case to examine the question whether the husband of appellee was guilty of such gross negligence as relieves the company from liability for his death. To authorize a recovery, it is not enough to simply show that the company were guilty of negligence, but it should also appear that deceased was not also guilty of negligence, in some degree comparable to that of the company inflicting the injury. Each party is bound, whilst pursuing their legal business, to exercise a due regard for the rights of others. And when each is equally at fault, and both parties negligent, the injured party has no right to recover for an injury he has thus contributed to produce. Each party must employ all reasonable means to foresee and prevent injury. Where the party receiving the injury has acted with even a slight degree of negligence contributing to produce the injury, to recover, he must show that the other party has been guilty of gross negligence.

Whilst the party upon whom the injury is inflicted must use all reasonable care, he is not held to the highest degree of precaution of which the human mind is capable. Nor to recover, need he be wholly free from negligence, if the other party has been culpable.

Whilst we can have no doubt that the agents of the road were guilty of negligence in stopping their freight train on the side-track, between the ticket-office and the passenger train, at the time the latter was receiving passengers, the deceased was bound to use reasonable efforts to escape injury. The company, having placed the freight train between the ticket-office and the passenger train, should have opened the former so as to afford an easy and safe passage to and from the passenger-cars. In that position, all persons wishing to pass must have gone between or around the cars. To pass through was hazardous; to go around a lengthy train very inconvenient. And when placed in that position, the imprudent or reckless might be induced to pass through and become injured.

The deceased knew that an engine was attached, with steam up, liable to move at any moment. It was in the night, when the engineer or conductor would not be likely to see or know of his effort to pass between the cars. He gave no notice of his intention to pass through, and these officers had the right to suppose a prudent or reasonable person would not attempt to pass at the time, and under the circumstances. And the

evidence seems to show that the bell was rung, and the usual notice thus given, before the train was moved. We are, from all these facts, of the opinion that the deceased was guilty of gross negligence in attempting to pass between the cars when in motion, or when on the point of moving. There can hardly be a doubt but that any reasonably prudent and careful person would have gone around the train, or would have waited until it passed. His conduct, we think, contributed more largely to his death than the negligence of the company. Had he used ordinary prudence, the occurrence would not have taken place. And whilst the company were guilty of such negligence as would have rendered them liable for injury to a child, or a person of less than ordinary mind, yet the deceased, being an adult, must be presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence. Having failed to do so, the company cannot be held liable for the injury.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

CONTRIBUTORY NEGLIGENCE AS DEFEATING RECOVERY: See *East Tennessee etc. R. R. v. St. John*, 73 Am. Dec. 149; *Johnson v. Hudson River R. R.*, 75 Id. 375; *Chapman v. New Haven R. R.*, Id. 344; *Gavett v. Manchester etc. R. R.*, 77 Id. 422, and notes thereto collecting prior cases. In Illinois, although the plaintiff may be guilty of some degree of negligence, yet if it is but alight as compared with that of the defendant, the plaintiff may recover: *Courson v. Ely*, 37 Id. 341; *Chicago etc. R. R. v. Gretzner*, 46 Id. 83; *Chicago etc. R. R. v. Payne*, 49 Id. 503, 504; *Chicago etc. R. R. v. Sweeney*, 52 Id. 530; *Grand Tower etc. Co. v. Hawkins*, 72 Id. 388; *Chicago etc. R. R. v. Coss*, 73 Id. 397; *Chicago etc. R. R. v. Johnson*, 103 Id. 521; the principal case is cited to the foregoing proposition; and see note to *Freer v. Cameron*, 55 Id. 671.

THE PRINCIPAL CASE IS ALSO CITED in *Chicago etc. R. R. v. Murray*, 71 Ill. 607, and *Hund v. Geier*, 72 Id. 397, to the point that a child cannot be required to exercise the same degree of care as a person of maturer years; in *Kerr v. Forgue*, 54 Id. 484, to the point that ordinary neglect as to a person of full age and capacity might be gross negligence as to a child; and in *Chicago etc. R. R. v. Damerell*, 81 Id. 454, to the point that the burden of proof is always on the plaintiff to show that he was himself exercising ordinary care and diligence at the time of the accident.

MILLS v. THORNTON.

[26 ILLINOIS, 300.]

PERSONAL PROPERTY MAY BE TAXED WHERE IT IS PERMANENTLY LOCATED, although in general, personal property follows the residence of the owner and is there taxable.

BILL TO ENJOIN COLLECTION OF TAXES ON PERSONAL PROPERTY IN CERTAIN DISTRICT MUST AFFIRMATIVELY SHOW that the property was not taxable there.

BILL in chancery, filed by Joshua L. Mills, as executor of Eli R. Mills, to enjoin the collection of school taxes for the year 1859. The bill alleged that the complainant was a resident tax-payer of school district No. 8, township 31 north, range 1 west, and as such listed the personal property of the testator for taxation; but that school taxes were wrongfully charged on the personal property in school district No. 3. An injunction was allowed, but was afterwards dissolved, and the bill dismissed for want of equity.

T. E. Shaw and T. Dent, for the plaintiff in error.

Glover, Cook, and Campbell, for the defendants in error.

By Court, CATON, C. J. As was said in *Sangamon and Morgan Railroad Company v. County of Morgan*, 14 Ill. 163 [56 Am. Dec. 497]: "We think, with certain qualifications, personal property follows the residence of the owner, and is there taxable." This is so where the personal property is not permanently located in another place. If it be, then it may be taxed where it is thus permanently located. A resident of one place may have a farm or a store or a manufactory in another, and the property permanently connected with either of these concerns would be properly taxable where such concerns were situated. This bill does not show that the property upon which the tax complained of was levied was not permanently located and established in district No. 3. Upon this point the bill is entirely silent, but seems to have relied upon the general principle that property follows the residence of the owner. As every reasonable presumption is against the pleader, we think that he should have shown affirmatively that the property was not taxable in district No. 3. This certainly he has not done, and the injunction was properly dissolved. The decree must be affirmed.

Decree affirmed.

PERSONAL PROPERTY, WHERE TAXED: See *City of New Albany v. Meekin*, 56 Am. Dec. 522, and exhaustive note; *Sangamon etc. R. R. v. County of Morgan*, Id. 497. The principal case is cited in *First National Bank v. Smith*, 65 Ill. 54, as recognizing the separation of the *situs* of personal property from the domicile of the owner, for the purposes of taxation; and see it commented upon in *King v. McDrew*, 31 Id. 421, in discussing where personal property must be listed for taxation, under the Illinois revenue law of 1853.

CITY OF PEKIN v. NEWELL.

[26 ILLINOIS, 320.]

CITY WHICH CONSTRUCTS-HIGHWAY IN DIFFERENT MANNER FROM THAT AUTHORIZED IS LIABLE FOR INJURIES caused by careless construction, as much as though it had built the highway in the mode prescribed.

CASE. The opinion states the facts.

James Roberts, for the appellant.

J. K. Cooper, for the appellee.

By Court, CATON, C. J. By the law, the city of Pekin was authorized "to build and construct an embankment and plank road across the Illinois river-bottom opposite said city." Under this authority, the city constructed a pile bridge across the bottom in so careless a way that the horse of the plaintiff, when rightfully passing along the way, fell through and was killed. The city now says that it was only authorized to build an embankment and plank road, and that in building this pile bridge it exceeded its authority, and hence it was not the act of the city, but only of its officers, who did it in the name of the city, and that the city is not responsible for the manner in which the work was done. This is an ungracious defense in every point of view, and is not supported by any legal principle. Had the city officers, acting in the name of the city, gone across the river into another county, and constructed this work without any authority of law to go there, then the cases cited would apply; but here the city was authorized to construct a road at the place where it constructed this road; and if it did not construct it in the mode prescribed by law, that increases rather than diminishes its liability. Suppose the law had, in express terms, authorized the construction of this road on a pile bridge, and provided that the piles should not be less than six feet apart, and they had been placed ten feet apart, or that oak piles were required, and bass wood had been used, could this departure from the requirements of the law

exonerate the city from liability for damages resulting from this very violation of the law? Had the road been built upon an embankment, and covered with plank, as the law seems to contemplate, it is not likely that the plaintiff's horse would have fallen through it. Assuming that this road was not built in a manner contemplated by the law (which is a question we do not decide), and we think the liability of the city is quite as manifest as if the road had been built in every particular according to the law.

Some other minor questions were made in the case, which we have examined, but do not think necessary to discuss. The judgment must be affirmed.

Judgment affirmed.

LIABILITY OF CITIES AND TOWNS FOR INJURIES RESULTING FROM DEFECTIVE SIDEWALKS, STREETS, AND HIGHWAYS: See *Browning v. City of Springfield*, 63 Am. Dec. 345, and note; *Savage v. Bangor*, Id. 658; *James v. San Francisco*, 65 Id. 526; *Stinson v. City of Gardiner*, 66 Id. 281; *Roswell v. City of Lowell*, Id. 464; *Norris v. Litchfield*, 69 Id. 546; *Commissioners v. Martin*, Id. 333; *Hubbard v. City of Concord*, Id. 520; *City Council of Montgomery v. Gilmer*, 70 Id. 562; *Storrs v. City of Utica*, 72 Id. 437, and note; *City of St. Paul v. Seitz*, 74 Id. 753.

THE PRINCIPAL CASE IS CITED in *Stanley v. City of Davenport*, 54 Iowa, 469, to the point that municipal corporations are responsible for the acts of their officers and agents, acting within the apparent scope of their authority; and in *Haag v. Commissioners of Vanderburgh Co.*, 60 Ind. 514, to the point that it is only where there has been some abuse of the authority conferred upon municipal corporations that actions against them can be sustained; but it was distinguished in *City of Chicago v. Turner*, 80 Ill. 420, in that in it there was no question of power, but only as to the lawfulness of its execution, in holding that where an injury results from the acts of city officers in attempting to enforce an ordinance which was *ultra vires* and void, there was no right of action against the city.

FULLER v. PAIGE.

[26 ILLINOIS, 258.]

CHATTEL MORTGAGE IS GOOD WITHOUT BEING RECORDED, as against the mortgagor.

SALE OF CHATTELS BY MORTGAGOR IS VOID, AS AGAINST MORTGAGEE, if made to one who purchases with knowledge of the unrecorded mortgage, and with the intent to defraud the mortgagee.

TRESPASS WILL NOT LIE AGAINST MORTGAGEE FOR TAKING CHATTELS, MIXED WITH HIS OWN, so that they could not be distinguished by another, who refuses to separate them.

TRESPASS for taking and carrying away a lot of drugs and medicines. The property was mortgaged by one Myers to the

defendant Paige. Myers, who remained in possession as clerk, afterwards sold the property to the plaintiff Fuller, who knew of the existence of the mortgage, and who bought the property so that Myers might have money with which to pay his debts. Fuller stated at the time that the mortgage was not good, as it was not recorded. After the purchase, Fuller added a small stock to the drugs, and carried on business. Paige requested Fuller to select the goods he had added, but Fuller refused to do so, whereupon Paige took the entire stock. The verdict was for the defendant. The questions in the case are stated in the opinion.

Glover, Cook, and Campbell, for the plaintiff in error.

Hoyne, Miller, and Lewis, for the defendant in error.

By Court, BREese, J. In this case, the court below instructed the jury, in substance, that if the appellant, then plaintiff, purchased the goods described in the declaration with a full knowledge of the mortgage to the defendant, and with the intent to cheat and defraud him of his lien, the sale was void as to the mortgagee.

This we hold to be the law. The mortgage was good as against Myers, the mortgagor, without being recorded. If, then, the appellant purchased the goods of Myers with the knowledge of the mortgage, and for the purpose and with the intent to enable Myers to put the money in his own pocket, and cheat the mortgagee, that was such a fraud in fact as to avoid the sale to appellant. It cannot be tolerated that a party thus acting should be permitted to enjoy the fruits of such conduct.

We do not say that the mere knowledge of the existence of a mortgage unrecorded would make the purchase from the mortgagor a fraud in law, where there is no intent manifested by such purchaser, to commit a fraud in fact by enabling the mortgagor to pocket the avails, and so cheat the mortgagee.

When a purchase from a mortgagor is *bona fide*, and without any intent to cheat, the case might be different. Here, the facts show a contrivance and a design by the appellant, knowing of the existence of the mortgage, in collusion with the mortgagor to cheat the mortgagee. The parties cannot receive our aid in furtherance of such intention, nor do we think the law requires it. Good faith, and absence of fraudulent intent, must characterize all contracts.

Upon the other point, the appellant had mixed up his own

goods with the goods mortgaged, and he was notified to select his, and take them away, which he refused to do. The appellee had a right to take his own goods, and if he took some not his property, they being so confounded with his own that he could not distinguish them, it would be fraud to charge him in trespass, however he might be liable in trover. On the whole case, we think justice is with the appellee, and we accordingly affirm the judgment.

Judgment affirmed.

CHATTEL MORTGAGE IS GOOD AS BETWEEN PARTIES, or their representatives, although not executed, acknowledged, or recorded, as required by statute: *Webster v. Nichols*, 104 Ill. 177, citing the principal case.

CONFUSION OF MORTGAGED GOODS: See note to *Pulcifer v. Pax*, 54 Am. Dec. 595; *Willard v. Rice*, 45 Id. 226; and see note to *Gregg v. Sanford*, 76 Id. 737.

SMITH v. LAMB. SMITH v. POWELL.

[26 ILLINOIS, 396.]

VENDEE MAY RESCIND CONTRACT FOR SALE OF LAND FOR VENDOR'S INABILITY TO CONVEY, and recover the money paid on the contract, in an action for money had and received.

VENDEE NEED NOT TENDER BALANCE OF PURCHASE-MONEY FOR LAND before he can maintain an action against the vendee to recover back the money paid on his contract, when the vendor admits that he has not the title and could not convey.

ACTIONS of *assumpsit* for money had and received, brought by Jane Lamb and James Powell against Joseph Smith to recover back money paid by them on contracts which they had made with Smith in August, 1857, for the purchase of land. The facts are stated in the opinion.

Jesse B. Thomas, for the appellant.

S. A. Irvin, for the appellees.

By Court, CATON, C. J. These cases are alike in every essential feature, and will be considered together.

If it be true that the plaintiffs had a right to abandon or rescind their contracts for the sale of the land upon which the money was paid for the default or inability of the defendant to convey, they had a right to recover the money paid on their contracts, as for money had and received, whether their contracts were by parol or under seal. This law is so well settled

in this court as to preclude the necessity of discussing it at length now.

The more serious question is, Had the plaintiffs a right to terminate the contracts when they did? By the contracts, the vendees were to pay the stipulated price of the land in four installments, at specified times, and to pay the taxes to become due on the lands, and upon the payment of the last installments, the vendor was to convey the lands, and time is made of the essence of the contracts, the vendees to forfeit all payments made if they failed to perform on their part. The three first payments were made, either at or before they fell due, or were accepted by the vendor after due, so that he could not complain that they were not promptly made. Neither the vendor nor the vendees paid the taxes for 1858 and 1859, but the premises were sold in 1859 for the taxes of 1858. Had the vendor declared a forfeiture of the contracts for the failure of the vendees to pay the taxes to the collector, a serious question would arise, whether a fair construction of the contracts required the vendees to pay the taxes to the collector or to the vendor. But as the vendor never claimed or declared any forfeiture by the vendees for any cause, that question is not necessarily involved, and we shall not discuss it.

On the day when the last payments fell due, when it was the duty of the vendor to make conveyances, and of the vendees to pay the balance due upon the contracts, the vendees called upon the vendor and offered to pay the balance upon receiving an effectual conveyance. The vendor then admitted that he had not a title to the land, and could not convey; nor did he pretend that he ever had a title. He said one Hall owned the lands, to whom he had assigned the contract, and the fair presumption is, that he never had a title to the lands, but that he had sold them without right, and for the fraudulent purpose of getting the plaintiffs' money, and to devise some pretext for holding it. Be this as it may, there is no question that when the parties met, on the first of February, 1860, neither party had rescinded or attempted to rescind the contract. It was still subsisting, and so considered by both parties. The vendor did not refuse to convey because of any default by the plaintiffs, but solely for the reason that he did not own the lands, and could not convey them. That fact entirely absolved the vendees from any duty or obligation to tender the balance then due. The law requires no such silly

and useless ceremony. Then it appeared that the vendor was not entitled to, and could not receive, the purchase-money, and he had no right to claim a tender of money which he had no right to receive. The purchasers had a right to repudiate the contracts as forfeited by the vendor, or rather as never having been rightfully executed by him, because he had no right to make them. The plaintiffs had the right to say, You have received our money wrongfully and even fraudulently, and you must pay it back to us as if you had never made these contracts, which you cannot perform, and which you should never have made. By bringing these actions, the plaintiffs treat the contracts as forfeited by the vendor, as they had a right to do, and the court below has rightfully allowed them to recover the money paid on the contracts, with interest.

The judgments must be affirmed.

Judgments affirmed.

VENDOR MAY RESCIND CONTRACT AND RECOVER BACK MONEY PAID, if the vendor is unable to make a good title: *Dennison v. Gracelin*, 56 Ill. 96; *Wheeler v. Mather*, Id. 240; and see *Wheeler v. Mather*, Id. 253, per Scott, J., dissenting; *Benton v. Clifford*, 68 Id. 70, all citing the principal case; *Judson v. Wess*, 6 Am. Dec. 392; note to *Richardson v. McKinnon*, 12 Id. 312; note to *Johnson v. Evans*, 50 Id. 679; and see *Herrington v. Hubbard*, 33 Id. 426; *Bryon v. Loftus's Adm'r*, 30 Id. 242; *Goodspeed v. Fuller*, 71 Id. 572; and a tender of the balance of the purchase price need not be made: *Shipford v. Underwood*, 53 Ill. 483; *Clark v. Wels*, 57 Id. 441, both citing the principal case; but see it distinguished on this point in *Gerrish v. Maher*, 70 Id. 477. Part of the purchase-money cannot be recovered, if the vendor is willing to perform his part of the contract: *Cobb v. Hill*, 70 Am. Dec. 432.

BROWN v. MOORE.

[25 ILLINOIS, 421.]

TIME WITHIN WHICH PETITION TO ENFORCE MECHANIC'S LIEN MUST BE FILED CANNOT BE EXTENDED, as against a mortgagee, by an agreement between the material-man and the debtor to extend the time of payment.

PETITION by William Moore, to enforce a mechanic's lien against Simpson, Wild, & Co., for an engine and castings for a distillery and flouring mill. Brown, Goddin, & Co., who were mortgagees, were made parties. The facts are stated in the opinion. The plaintiff had a decree in his favor, and the mortgagees appealed.

B. C. Cook, for the appellants.

N. H. Purple, for the appellee.

By Court, CATON, C. J. By the terms of the contract under which this work was executed, the last payment was to be made on the first day of December, 1857. By the same contract, the work was to have been completed on the first day of June, 1857, but the engine was not completed till the twenty-second of June, 1857, and the last of the castings and iron-work were not delivered till the twenty-third of April, 1858. At this time, at least, if not on the first of December, 1857, the statute of limitations of six months, within which the bill had to be filed to enforce the lien as against these appellants, began to run. Six days after this, on the twenty-ninth day of April, 1858, another bargain was made between the complainant and Simpson, Wild, & Co. for an extension of the time of payment for one, three, and four months from that day, so that the last payment was thus extended from the first of December, 1857, to the twenty-ninth day of August, 1858. On the twelfth of November, 1858, this petition was filed, and the question is, Was it filed in time to save the lien under the statute? In any possible aspect, the limitation had commenced running when this agreement was made to extend the time of payment, at least six days before the work was all done, and the material all furnished, and the money all due; and as the statute declared, if the petition to enforce the lien was not filed within six months, at least, from that time, the lien was gone as to these appellants, who were mortgagees. Now, could Simpson, Wild, & Co., as to whom there was no limitation, make a contract with Moore, and without the consent of the mortgagees, to extend the time of payment, and thereby extend the statute of limitation from the first of June, 1858, to the twenty-ninth of February, 1859? That the rights of incumbrancers secured to them by a positive statute could be thus trifled with without their knowledge and consent, cannot be for a moment admitted. Even this could have been done before the last payment became due, and consequently before the statute commenced running, which is by no means conceded, there is another well-settled rule of law which would prevent it after that event. When a statute of limitation once commences to run, no subsequent event can arrest it: certainly none, unless it be the act or consent of the party whose rights are to be affected by it. As between themselves, the parties to the contract could modify it as they pleased, but not in such way as to affect the rights of others. Other parties had a right to take security on this land with reference to

this lien, and the time when it would expire, and these could not be cut out by any agreement between other parties, which should have the effect to extend the time when the lien should expire.

The petition was filed too late as to these appellants, and as to them it should have been dismissed. The decree is reversed.

Decree reversed.

THE PRINCIPAL CASE IS CITED in *Kelly v. Kellogg*, 79 Ill. 480, to the point that it is neither lawful nor just for material-men and contractors, by a secret agreement, to extend the time of payment, after other rights have attached.

WARD v. WILLIAMS.

[26 ILLINOIS, 447.]

UNAUTHORIZED ACT MAY BE RATIFIED BY IMPLICATION, if done by an agent in excess of his authority, in the name of his principal, and the principal does not repudiate the act as soon as fully informed; although an affirmative ratification is necessary, if the act is done by a stranger in the name of another, to bind the latter.

ACTION by Joseph H. Williams, as president of the Southern Bank of Indiana, against Eber B. Ward, as the indorser of a bill of exchange. Ward had written his name on the back of a printed form of a promissory note, which was in blank, except that the check mark was filed in with three thousand dollars, and had given it to one G. F. Lewis, to raise money for Ward's use. Lewis presented the paper to the Southern Bank, and by his direction it was changed to the form of a bill of exchange, drawn by himself, payable to the order of Ward, on a bank of New York, in which form it was then discounted. The bill was sent to New York, and was protested for non-payment, due notice of which was given to Ward. The cashier of the Southern Bank had written to Ward concerning the transaction, on January 28, 1858, immediately after the paper was negotiated. The paper was finally presented by Williams to Ward for payment. Ward took the paper in his hands, examined it, and made no objections to the alterations, but stated that Lewis was primarily liable, and that he had been notified by Lewis not to pay it. The question of usury was raised, and the evidence relating to it is given in the opinion. The jury were instructed, on behalf of the plaintiff, that if, in making the paper, it was payable in New York, for

the purpose of allowing a rate of interest exceeding the legal rate in Indiana, the parties understanding that the money was to be paid in Indiana, and not in New York, the usury law of New York, given in evidence, had no application, and should be disregarded; and that if the defendant was immediately notified, after the alteration, of the alteration, it was his duty, if he intended to disaffirm the transaction and deny his liability, to give notice to the holder of his disaffirmance, and if he failed to do so, his acquiescence in and ratification of the act might be inferred therefrom. The plaintiff had a verdict and judgment, and the defendant appealed.

Scates, McAllister, and Jewett, for the appellant.

Gookins, Thomas, and Roberts, for the appellee.

By Court, CATON, C. J. The counsel, in their arguments, agree upon the correct principle of law as to the ratification of unauthorized acts done by one in the name of another. In general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification.

Here Lewis was the agent of Ward to fill up and negotiate the note indorsed by Ward, but in doing so he converted it into a bill of exchange, payable in New York. In this, he transcended his authority. But this was subsequently ratified by Ward, if not in express terms, he did so by the strongest implication. If the letter of the cashier, of the twenty-eighth of January, three days after this note was negotiated, and the notice of protest, did not inform Ward of all the alterations which had been made in the paper by his agent Lewis, or by his direction, which is the same thing, he was informed of the full extent of the alterations when the bill was presented to him for payment by Williams. He then took it in his hands and examined it. Neither then nor at any other time did he make any objections to the alterations which had been made in the paper, or deny that it was a genuine piece of paper as it then stood; but he claimed that Lewis was primarily liable to pay it, and that Lewis had notified him not to pay it. He

made no objections to it on his own account. He did not complain that it was not his indorsement, or even that he was not liable on that indorsement for any cause. He did not pretend to know what objection Lewis had to the payment of the bill, and he had, or pretended to have, none himself. We repeat, if this was not an express ratification of the form which had been given to the paper by Lewis, it was a ratification by implication of the strongest possible character.

The only remaining objection to a recovery upon the bill is usury. The conclusive answer to this is, that it is not proved. The only witness who knew anything about the discounting of the bill says he does not know at what rate of interest it was discounted. He did not know how much Lewis received for the bill. If it was usury to sell the bill for its face, less the legal rate of interest, when exchange on New York was worth five per cent, the proof does not show but that he actually received this amount for the exchange. But an attempt is made to establish usury, by showing that a previous note between the same parties, which was several months over-due, was tainted in that way, and that this bill was given as a renewal of that. But this is not established by the proof. At the time Ward indorsed this bill, he remitted in other funds two thousand dollars towards paying that dishonored note, and the balance of a thousand dollars or more was paid by Lewis out of the proceeds of this bill. This is the most that can be made of this evidence towards establishing the renewal insisted upon, and it falls far short of establishing a renewal of the dishonored note, which may have been usurious. We are left at last in utter ignorance as to how much was received for this bill, or at what rate it was discounted. We have examined the instructions, and find them conformable to the principles above laid down, so far as they go.

The judgment must be affirmed.

Judgment affirmed.

RATIFICATION OF UNAUTHORIZED ACTS BY SILENCE.—The doctrine is well settled that a principal may ratify the unauthorized acts of his agent by acquiescence, or even by silence, after being fully informed: *Story on Agency*, sec. 255; *Wharton on Agency*, sec. 86; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Lee's Adm'rs v. Fontaine*, 10 Ala. 755; S. C., 44 Am. Dec. 505; *Owsley v. Woolhopper*, 14 Ga. 124; *Lewis v. Bourbon Co. Comm'rs*, 12 Kan. 186, 217; *Amory v. Hamilton*, 17 Mass. 102, 109; *Maddux v. Bevan*, 39 Md. 485; *Hazard v. Spears*, 2 Abb. App. Dec. 353; S. C., 4 Keyes, 469; *Reese v. Medlock*, 27 Tex. 120; *Curry v. Hale*, 15 W. Va. 867; and this rule applies where the principal is a corporation, if the unauthorized acts of its agents are within its corporate

powers: *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, 218; *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Machine Co.*, 90 Id. 607; S. C., 64 How. Pr. 467. It is the duty of the principal, then, to repudiate the unauthorized act; and one line of decisions holds that this must be done at once, on obtaining knowledge: *Johnston v. Berry*, 3 Ill. App. 256, 259; *Meister v. Cleveland Dryer Co.*, 11 Id. 227; *Pitts v. Shubert*, 11 La. Ann. 286; S. C., 30 Am. Dec. 718; *Kehlor v. Kemble*, 26 La. Ann. 713; *Foster v. Racknell*, 104 Mass. 167; *Crane v. Bedwell*, 25 Miss. 507; *Bredig v. Dubarry*, 14 Serg. & R. 27, 30; *Kelsey v. National Bank of Crawford Co.*, 69 Pa. St. 426; *Williams v. Storm*, 6 Coldw. 203; *Fort v. Coker*, 11 Heisk. 579; *Hart v. Dixon*, 5 Lea, 336; see the principal case cited to this effect in *Johnston v. Berry*, 3 Ill. App. 259; *Meister v. Cleveland Dryer Co.*, 11 Id. 227; *McGeoch v. Hooker*, Id. 655. But the weight of authority is in favor of the proposition that the principal must disaffirm an unauthorized act of his agent, and give notice thereof, within a reasonable time after becoming fully informed: *Prince v. Clark*, 1 Barn. & Cres. 186; *Mobile etc. Ry v. Jay*, 65 Ala. 113; *Williams v. Merritt*, 23 Ill. 623; *McDermid v. Cotton*, 2 Ill. App. 297; *McGeoch v. Hooker*, 11 Id. 649; *Pratt v. Putnam*, 13 Mass. 361, 363; *Brigham v. Peters*, 1 Gray, 139, 147; *Meyer v. Morgan*, 51 Miss. 21; *Wright v. Boynton*, 37 N. H. 9; *Cairnes v. Bleecker*, 12 Johns. 300; *Viana v. Barclay*, 3 Cow. 281; *Walker v. Walker*, 7 Bart. 260; *Saveland v. Green*, 40 Wis. 431; *Norris v. Cook*, 1 Curt. C. C. 464; *Abbe v. Rodd*, 6 McLean, 106; *Law v. Cross*, 1 Blackf. 533; *Gold Mining Co. v. National Bank*, 96 U. S. 640; and see *Miller v. Excelsior Stone Co.*, 1 Ill. App. 273; and what is a reasonable time is a question of fact, to be determined from all the circumstances of the case: *McDermid v. Cotton*, *supra*. The principal, of course, must have been fully informed of the unauthorized transaction: *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 565; and the act must not only be repudiated, but notice of such repudiation given: Id. In *Pollock v. Gantt*, 69 Ala. 373, S. C., 44 Am. Rep. 519, it was held that where an attachment was sued out by an agent, without authority, but the principal never repudiated the suit, the principal was liable to actual damages, if no cause existed for suing it out, although he would not be responsible for the malice, vexatious conduct, or wantonness of the agent, unless he caused or participated in such evil motive. *Bronson, J.*, in *Delafield v. State of Illinois*, 2 Hill, 160, S. C., 26 Wend. 192, thus places a limitation on the foregoing general rule: "Under particular circumstances, the silence of the principal for a very few days, after he is advised of an act done by his agent, may amount to strong presumptive evidence of ratification, especially where such evidence has a tendency to mislead the opposite party. But it will never do to apply so rigorous a rule where a state is the principal." The case of *White v. Langdon*, 30 Vt. 599, also lays down the doctrine in a restricted manner. It holds that it is not the duty of a principal, who has given his agent a special and limited authority to sell property, upon learning that the agent has sold it in violation of his authority, to seek the purchaser, and give him notice of his claim; and his omission to do so, and his mere silence, are not ordinarily to be construed as a ratification of the sale.

It is seen that the principal case makes a difference between acts done by an agent in excess of his authority and acts done in another's name by a mere stranger. This distinction was approved in *Searing v. Butler*, 69 Ill. 575, 578. The true rule seems to us to be stated by *Hallett, C. J.*, in *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248, 259, who, in referring to the principal case, says: "A distinction has been made between the acts of an agent who has gone beyond his authority and those of a mere

stranger intermeddling in affairs with which he is in no way concerned. In the case of a stranger, it has been said that the act will not be binding upon the principal unless expressly ratified by him. But the better opinion appears to be, that in this, as in the case where an agency exists, the approval of the principal may be inferred from his silence and acquiescence when informed of what has been done in his name. But all agree that the relations of the parties are of great consequence in determining the question of ratification, the presumption arising from acquiescence being very much stronger where the agency exists than in case of a mere stranger;" and see *Story on Agency*, sec. 256, 258; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329; S. C., 70 Am. Dec. 128; *Ladd v. Hilderbrant*, 27 Wis. 135; S. C., 9 Am. Rep. 445; compare *Sawland v. Green*, 40 Wis. 431, per Lyon, J. Chief Justice Hallett, after repudiating the distinction made by the principal case, goes on to hold that a principal must disaffirm an unauthorized act of his agent within a reasonable time after notice thereof, or his silence will be conclusive evidence of his assent, where the delay will be prejudicial; but where no change in the position of the parties can occur from the principal's delay to approve or disapprove the act, mere silence on his part affords an inference of ratification, to be considered by the jury, but no estoppel is created thereby; and see those views approved in *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 565; *Breed v. First Nat. Bank*, 4 Id. 481.

It should be carefully observed that the general rule that ratification is only possible where the unauthorized act is done for and in the name of the assumed principal, applies to the subject under discussion. This is well stated by Earl, J., in *Hamlin v. Sears*, 82 N. Y. 327, who says: "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text-writers upon the law of agency. But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority."

AMERICAN EXPRESS COMPANY v. BALDWIN.

[26 ILLINOIS, 504.]

EXPRESS COMPANY MUST ACTUALLY DELIVER, OR OFFER TO DELIVER, PACKAGE at the residence or place of business of the consignee, in order to discharge itself from liability as a common carrier.

EXPRESS COMPANY IS BOUND TO USE ORDINARY CARE for the safe-keeping of a package if held by it as a bailee or warehouseman.

ASSUMPSIT by Herman Baldwin against the American Express Company, to recover the value of a package of money sent by the plaintiff from Baraboo, Wisconsin, to D. J. Baldwin, Madison. The consignee had left a written order with Douglass, the agent of the company at Madison, to deliver all packages addressed to him to "C. T. Flowers, or Dane County Bank." The package arrived at Madison, but there was no actual delivery, or offer to deliver, although the clerk of the

bank and the clerk of Flowers were informed by a messenger of the company that there was a package at its office for Baldwin. No entry of the package in the delivery-book was made, although the evidence showed that packages might be ready for delivery before entry. Douglas placed the package in the company's safe, the key of which he kept in his pantaloons pocket; and when he closed the office for the night, he placed the office key in his coat pocket. During the night, the keys were taken from his pockets, the office and the safe opened, and the money stolen. The plaintiff had judgment, and the defendant appealed.

Scates, McAllister, and Jewett, for the appellant.

S. W. Fuller and M. Blanchard, for the appellee.

By Court, CATON, C. J. Upon the question of delivery, the evidence in this record differs from that in the same case reported as *Baldwin v. American Express Co.*, 23 Ill. 197 [74 Am Dec. 190], in this, that in that case the proof showed that the package was not ready for delivery till it was duly entered in the delivery-book, whereas on this trial, the witnesses testify that, according to the course of business in express companies, a package may be ready for delivery before such entry is made; but upon the question of the actual delivery or offer to deliver this package, the evidence upon this trial did not differ materially from what it was on the former trial, and there we held that there was no delivery or offer to deliver, so as to discharge the defendant from the liability of a common carrier, and this, too, independently of the want of an entry of the package on the delivery-book. We are still of the same opinion, but think it would be superfluous to add anything on this subject to what was then said.

But even admitting that the defendant was only liable as a common bailee, or warehouseman, it was bound to the exercise of ordinary care for the safe-keeping of the package. This, we think, was manifestly wanting. The package was placed in the safe by Douglass, which he locked, and placed the key in his pantaloons pocket. Then he closed the office in which the safe was, and placed the office key in his coat pocket, and left the premises for the night. When he retired for the night, he hung his pantaloons on the bed-post and his coat behind an open door in an adjoining room. His bedroom was on the ground-floor, with a window opening upon open ground, and not more than two feet from the ground. It was a warm night,

and this window was left open. He was a sound sleeper, and was not easily awakened, unless spoken to. During that night the keys were taken from his pockets, the office and safe opened, and the money stolen. All this in the city of Madison, the capital of Wisconsin.

Now, the bare statement of these facts shows gross negligence in the care of this money. The window was opened to the burglar and the thief, and he was, by the tempting prize always supposed to be in an express safe, invited to walk in. It is of little use to lock a safe or a door, unless the key is protected with reasonable care.

We approve of the judgment, and it must be affirmed.

Judgment affirmed.

COMMON CARRIER, WHETHER MUST DELIVER TO CONSIGNEE PERSONALLY: See *Porter v. Chicago etc. R. R.*, 71 Am. Dec. 286, and note collecting prior cases; *Marshall v. American Express Co.*, 73 Id. 381; *Dean v. Vaccaro*, 75 Id. 744. Express companies are required to make personal delivery: *Witbeck v. Holland*, 38 How. Pr. 278, citing the principal case; *Baldwin v. American Express Co.*, 74 Am. Dec. 190.

WAREHOUSEMAN IS BOUND TO USE ORDINARY CARE: *Schmidt v. Blood*, 24 Am. Dec. 143, and note; *Cox v. O'Riley*, 58 Id. 633; *Chase v. Washburn*, 59 Id. 623.

PEOPLE v. ORGAN.

[27 ILLINOIS, 27.]

OFFICIAL BOND IS BINDING ON PRINCIPAL OBLIGOR, BUT NOT ON SURETIES, where it is presented for approval by the principal, signed and sealed, but with the amount of the penalty in blank, and the penalty is then inserted with his consent, but in the absence of the sureties, and without a subsequent delivery or ratification by them.

PLAINTIFF MUST RECOVER AGAINST ALL DEFENDANTS OR NONE, in debt on contract.

DEBT against Henry A. Organ and his sureties, upon a bond given by Organ, as collector of Wayne county for the year 1859. The facts are sufficiently stated in the opinion. The court gave the defendants judgment for costs, to which the plaintiffs excepted.

Hanna, Whiting, and Cooper, for the plaintiffs in error.

E. Beecher, for the defendants in error.

By Court, WALKER, J. It appears that Organ, the principal obligor in this bond, presented it, signed and sealed in blank, for approval. The penalty was not then inserted, and some

question arose as to the legality of filling in the amount in the absence of the securities, and without competent authority for the purpose. It was, however, finally agreed that the amount should be inserted in the bond, which was done. Organ seems to have been present, and it was done at his request, with his approbation and consent. He cannot therefore be heard to object to the validity of the bond. Whether it was, after the blank was filled, binding upon his sureties, can make no difference, as what he did at the time amounts to a redelivery by him after the blank was filled.

But the question is still presented whether the filling the blank with the amount of the penalty, after the sureties had executed it, without their knowledge or consent, rendered it void as to them. Cases may no doubt be found which hold that the filling a blank promissory note under seal, with the amount agreed upon, does not release the indorser. And that such is the case with commercial paper generally, is certainly true. But such cases are exceptions to and not the rule. After a deed has been executed, it may be avoided by erasure, interlineation, or other alteration in a material part; or by an intentional breaking or defacing of the seal by the obligee. A deed to be binding must be in writing, signed, sealed, and delivered by the parties. It has been held that a paper signed and sealed in blank, with verbal authority to fill the blank, which is afterwards done, is void as to the parties so signing and sealing, unless they afterwards deliver or acknowledge or adopt it: *Gilbert v. Anthony*, 1 Yerg. 69 [24 Am. Dec. 439]; *Wynne v. Governor*, Id. 149 [24 Am. Dec. 448]; *Byers v. McClanahan*, 6 Gill & J. 250; *Parminster v. McDaniel*, 1 Hill (S. C.), 267; *Boyd v. Boyd*, 2 Nott & M. 125; *United States v. Nelson*, 2 Brock. 64; *Ayers v. Harness*, 1 Ohio, 368; *McKee v. Hicks*, 2 Dev. L. 379.

It is believed that these decisions fully accord with the rule announced by the British courts. And it is for the plain reason that after the blank has been filled up, the deed ceases to be that which the parties executed. It is then of a different tenor, and is another instrument, as much so as if it was executed in a penalty for one sum, and was changed to a different and larger sum. And without consent, redelivery, or a subsequent ratification, no one would suppose that such an alteration could be made without releasing the parties. In this case, there is no evidence that the sureties consented to the change, redelivered the bond, or in any manner ratified the act done.

And these cases held that even if they had agreed that the blank might be filled after they had executed the bond, still they would not be bound, unless they had been present and consented, or had adopted the act by a subsequent delivery, or by a ratification of the change. As the plaintiff must, however, recover against all of the defendants 'sued upon a contract, or against none, the court below decided correctly in rendering judgment for costs in favor of the defendants, which is affirmed.

Judgment affirmed.

BOND EXECUTED IN BLANK AS TO AMOUNT, WHETHER BINDING IF FILLED UP: See *Davenport v. Sleight*, 31 Am. Dec. 420, and note; *Williams v. Crutcher*, 35 Id. 422. The principal case, based upon the old technical rule of the common law, is overruled in *City of Chicago v. Gage*, 95 Ill. 593, 610, 615; *Stern v. People*, 102 Id. 533.

WILLARD v. BASSETT.

[27 ILLINOIS, 87.]

ATTORNEY, WHO IS ADMINISTRATOR, IS NOT ENTITLED TO ALLOWANCE AGAINST ESTATE FOR PROFESSIONAL SERVICES, in cases which he prosecutes or defends as administrator.

APPEAL from an order of the circuit court of Marion county. The appellant, Willard, an attorney at law, and Minerva Merrill, widow of N. C. Merrill, took out letters of administration on Merrill's estate. They afterwards resigned, and the appellee, Bassett, was appointed administrator *de bonis non*. Willard presented to the county court a demand against the estate, the greater part of which was for legal services rendered by him while acting as administrator in actions brought by and against the estate. The court refused to allow the demand, but finally allowed Willard and Mrs. Merrill a sum for their services, exceeding that to which they would be entitled. Willard appealed to the circuit court, which affirmed the judgment, but ordered the cause to be remanded, to have the amount apportioned between Willard and Mrs. Merrill, according to their respective services. Willard then appealed to this court.

W. Stoker, for the appellant.

James Bassett, pro se.

By Court, CATON, C. J. The only question in this case is, whether an attorney of this court, who is an administrator, is

entitled to an allowance against the estate, for professional services, in cases which he prosecutes or defends as such administrator. The authorities are uniform that this should not be allowed, and every principle of sound policy forbids it. The law cannot permit the idea that a person can take the office of executor or administrator as a business, or as a means of making money. It must ever associate with that place, to a certain extent, the idea of benevolence or philanthropy. We must ever assume that whoever takes such a position is actuated by an impulse of generosity and a desire to do good to others, rather than to make it a source of profit to himself. He must not be expected to suffer loss in the discharge of his duties; hence he must be allowed his necessary disbursements, and a reasonable compensation for the time and trouble bestowed upon the business of the estate. But beyond this, the court should never go. If he chooses to exercise his professional skill as a lawyer in the business of the estate, that must be considered a gratuity. To allow him to become his own client and charge for professional services in his own cause, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase their professional business, which would lead to most pernicious results. This is forbidden by every sound principle of professional morality as well as by the policy of the law.

We think the decision of the court below was proper, and it must be affirmed.

Judgment affirmed.

ATTORNEY CANNOT USE RELATION TO OBTAIN ADVANTAGE TO HIMSELF: *Cox v. Sullivan*, 50 Am. Dec. 386; *Henry v. Raiman*, 64 Id. 703. The principal case is approved, on a somewhat similar state of facts, in *Hough v. Harvey*, 71 Ill. 75; and see it referred to in *Field v. Colton*, 7 Ill. App. 385, on the general proposition that a trustee shall not make any advantage to himself out of the trust fund.

ILLINOIS CENTRAL R. R. Co. v. DICKERSON.

[27 ILLINOIS, 55.]

RAILROAD COMPANY IS NOT BOUND TO KEEP PATROL AT NIGHT ALONG ITS ROAD, to see that the fence is not broken down. If the company uses all reasonable diligence to keep up a good and sufficient fence, it is not guilty of negligence in that particular.

ACTION against the railroad company to recover the value of three animals killed by it. The case was heard without

the intervention of a jury, and the court gave judgment for the plaintiff. The company appealed. The evidence upon which it is sought to reverse the judgment is sufficiently stated in the opinion.

Haynie and Green, for the appellant.

C. S. Ward, for the appellee.

By Court, CATON, C. J. The appellant's counsel is mistaken in the supposition that the proof does not show that the place where the cattle were killed was not in a town or village, or at a road-crossing. The proof does clearly show that at the place where the accident happened, the company was bound to maintain a good and sufficient fence.

If the fact were clearly established that the fence was up the night before, at the point where the cattle actually got in, we think that would be a sufficient compliance with the duty imposed by the law, which is, to maintain a good and sufficient fence. When up, the proof does not show that the fence, at this point, was not good and sufficient. It cannot be the duty of the railroad company to keep a patrol all night the whole length of their road, to see that the fence is not broken down by breachy cattle, by evil men, or by a whirlwind. If the company use all reasonable diligence to keep up the fence, that is all the law requires, and it is not guilty of negligence in that particular. Although the proof in this case tends to show that the fence was up the night before, it is by no means of so conclusive a character as to require us to set aside the finding of the court below for that reason. The foreman in charge of the repairs of the road at that point, whose duty it was also to keep up the fence, first states that he passed down the road about six o'clock the night before, and that the fence, at the point where the cattle got in, was then up, and that at six o'clock the next morning he found it down, and put it up. He afterwards states that it might have been down the night before, but that he did not see it down, and he thinks it was not. This shows that he depended on his general observation, and that his attention was not directed to this particular point; nor does he state that his mind was on the subject, and that he expressly examined the fence on his way down, to see that it was up. The witness Penrod says that he had seen the fence down at that point, but whether before or after the night in question, he could not say. But as the witness Burnes says he put up the fence as

soon as he found it down, on the morning when the cattle were killed, this tends to fix the time Penrod saw it down as having been before that morning. At any rate, the evidence tending to show that the fence was up the night before is not sufficiently conclusive to justify a reversal of the judgment for this cause.

The judgment must be affirmed.

Judgment affirmed.

RAILROAD COMPANY IS NOT BOUND TO KEEP PATROL AT ALL TIMES ALONG ITS ROAD, to look after the condition of the fence: *Illinois Central R. R. v. Swearingen*, 33 Ill. 294; *Illinois Central R. R. v. McKee*, 43 Id. 122, both citing the principal case; and as to the care required of a railroad company in fencing its track, see *Whitney v. Atlantic etc. R. R.*, 69 Am. Dec. 103; *German v. Pacific Railroad*, 72 Id. 220, and the notes thereto.

STATE v. ILLINOIS CENTRAL RAILROAD COMPANY.

[27 ILLINOIS, 64.]

PROPERTY SHOULD BE ASSESSED, FOR PURPOSES OF TAXATION, AT ITS PRESENT VALUE, and not at its prospective value.

RAILROAD PROPERTY SHOULD BE ASSESSED, FOR PURPOSES OF TAXATION, according to its value for the purposes for which it is constructed, and not for any other purposes to which it might be applied.

IN ASCERTAINING PRESENT VALUE OF RAILROAD PROPERTY, FOR PURPOSES OF TAXATION, an important element is the amount of net profits, if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income; but in connection with this, there should be considered what prudent men would give for the property, as a permanent investment, with a view to present and future income.

DEBT. The facts are fully stated in the opinion.

J. B. White, state attorney, *S. T. Logan*, and *M. Hay*, for the state.

J. M. Douglas and *A. Lincoln*, for the railroad company.

By Court, BREESE, J. This is an action of debt originally brought in this court against the defendants for taxes alleged to be due to the state for the year 1857 by the defendants, and unpaid.

To the declaration, the defendants have pleaded the general issue, payment, and set-off for over-payments, on which issues are made up. It is these issues, and these only, we are called upon to try.

After the institution of this suit, on the thirty-first of Janu-

ary, 1859, it was agreed between the parties that, in order to comply with the twenty-second section of the charter of the Illinois Central Railroad Company (Sess. Laws of 1851, p. 72), requiring them, after the expiration of six years from the grant of the charter, to list their stock, property, and assets for the purpose of state taxation, the defendants, on the thirteenth day of August, 1857, filed with the auditor of state a paper, of which exhibit A filed in the cause is a true copy. But upon this, the auditor assessed a tax for that year amounting to the aggregate sum of one hundred and thirty-two thousand and sixty-seven dollars and forty-four cents, being so assessed at sixty-seven cents on the one hundred dollars on the aggregate sum of nineteen million seven hundred and eleven thousand five hundred and fifty-nine dollars and fifty-nine cents, and that for the non-payment of this assessment, this suit is brought. It was further agreed that, for the year 1857, the defendants paid into the state treasury the sum of one hundred and forty-five thousand six hundred and forty-five dollars and thirty-two cents, a portion of which, namely, one hundred and eight thousand and eighteen dollars and sixty-one cents, was to apply to the five per cent of gross proceeds provided for in section 18 of the charter, and the remainder, namely, thirty-seven thousand six hundred and twenty-seven dollars and twenty-one cents, was to apply to the object of the assessment above mentioned. It was then agreed that, on the trial, this court might receive evidence from both the parties, or either of them, as to the true value of the stock, property, and assets contained in the list, at the time of filing it, and might, if this court should be of opinion the true value at the time of listing is the true legal basis for the assessment, modify the assessment so as to conform to such basis, provided that in this case the aggregate value of the stock, property, and assets shall not be reduced below thirteen million of dollars, and provided further, that this case shall not, as fixing a basis of assessment, be claimed as a binding precedent in any future case in or out of court. It was further agreed that the only questions to be submitted to the court and to be decided are: 1. Whether, by the charter of said company, that company is liable to pay any taxes exceeding in amount two per cent on their gross receipts, and whether, if the taxes assessed on their property exceed the amount of the two per cent on the gross receipts of the road, the company is bound to pay the balance of the taxes; 2. The court is to decide, on evidence, whether

the property of the railroad has been estimated too high, and if too high, how much it should be reduced to make it conform to its real taxable value, provided it is expressly agreed that the valuation shall not be reduced below thirteen million of dollars; and 3. If the court decides that the company is bound to pay taxes, if they exceed two per cent of the gross proceeds of the road, then the court shall give judgment in favor of the plaintiff for such amount as the taxes, at the rate of sixty-seven cents on the one hundred dollars, on the assessed value as fixed by the court, exceed the two per cent aforesaid of the gross receipts of the road paid into the treasury for that fiscal year.

At the date of this agreement, a bill was pending before the legislature then in session, for an act in relation to assessments of the Illinois Central Railroad Company, when it was stipulated by these parties on the eighteenth of February, that in the event of the passage of that bill, there should be no revaluation of the property of the company, nor any appeal from the assessment for the year 1857, but the counsel for the state agreed to remove the limit of thirteen million of dollars, and leave the valuation as entirely open to the court. The bill referred to became a law on the twenty-first of February, 1859.

Exhibit A is nothing more than the list of the property owned by the company, and its valuation, as made by them and returned to the auditor.

The argument on the first proposition was not presented fully to the court, but alluded to only by the counsel for the state. It was considered, as the case then stood, it would be unnecessary to make up any decision upon it. The case turned upon the second proposition, as to the valuation of the property, and on that point it was agreed that the evidence heard by this court at the last November term, held for the first grand division, should be considered as before the court now here. That testimony was taken on an appeal from the assessment of the auditor, as prescribed by the act of 1859 (Sess. Laws 1859, pp. 206, 207), and full evidence was produced and examined, both on the part of the people and on the part of the defendants. The most experienced and intelligent railroad men in the west were fully examined on all the elements of value, as subsisting in a railroad concern, and in this road particularly, ample notes of which we have preserved.

There being no conflicting testimony before the court on the question of value, the court could not hesitate in its judgment on that point, but like a jury, were compelled to find on the evidence. Accordingly, the court directed the following order to be entered in the cause:

"THE ILLINOIS CENTRAL RAILROAD CO. v. THE PEOPLE OF THE STATE OF ILLINOIS. An appeal from the assessment of the auditor.

"And now at this day come the said parties, by their attorneys, and a certified copy of the list and valuation of the stock, property, and assets owned by said company, as made by the auditor of public accounts of the state of Illinois, having been filed, and from which this appeal is taken and prosecuted by said company; and the court proceeding to hear the evidence presented by the state, and by said company, as to said valuation, do find that the aggregate value of the stock, property, and assets owned by said company, to be listed for taxation, is four million nine hundred and fifty-two thousand dollars, and no more, and the clerk of this court will certify the said aggregate value so found by the court, to the auditor of public accounts, in pursuance of the statute in such case made and provided."

Some of the witnesses confined their valuation of the railroad to its present value, whilst others embraced, in their testimony, its prospective value also, but in their aggregates they do not essentially differ. We understood the witness called on the part of the state to include its prospective value in his estimate, and with that in view, he would not desire to be one of a company to take the road and operate it at five millions.

It was urged on the argument by the counsel for the state that the prospective value of the road should be taken into the estimate, and not its income. Such value is purely speculative, it must be admitted, and we very much question if it is a proper element in the present or any like case. The assessment is for the time being only, and the value of the property for such purpose should be limited to that time, the more especially, as in the efflux of time other valuations are required to be made. At any subsequent assessment, the proofs adduced may show a much higher valuation. The law does not design this to be permanent by any means. The ninth section of the act, under which the appeal was taken by the company (Sess. Laws 1859, p. 207), provides "that all the provisions of this

act shall apply to the listing, valuations, and assessments of said years (1857 and 1858), as well as to all future listings, valuations, and assessments." If, then, the property is more valuable in 1859 or in 1860 than as now found, or in subsequent years, the taxes will be assessed accordingly, so that the injunction of the constitution "that every person and corporation shall pay a tax in proportion to the value of his or her property," will be regarded. This clause has been understood to mean the value at the time of taxation or assessment. Values are fluctuating and changeable, as all experience shows. Nor is it easy at any one period of time to lay down a general and satisfactory rate of certain application in all cases for the purpose of ascertaining the value of many kinds of property subject to taxation. Where property has a known and determinate value ascertained by commerce in it, as in most kinds of personal property, or fixed by law, as money, there can be no difficulty. But there are many kinds of property as to which the assessor has no such satisfactory guide. Such is peculiarly the case with railroad property, and other similar property, constructed, not only for the profit of the owners, but for the accommodation of the public, under the sanction and by the exercise of the sovereign power of the state. In such cases, the inquiry should be, What is the property worth to be used for the purposes for which it is constructed? and not for any other purpose to which it might be applied or converted, or for which it might be used. In such cases, if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income, one very important element for ascertaining its present value is discovered, and that is its net profits. When property is thus improved, it is manifest that it is more or less valuable as it yields a greater or less profit in its product and economical use. No prudent purchaser of such property would neglect, in the first instance, to look at the income the property yields, so that he might thereby judge what profits he might in the future reasonably expect from his investment. To ascertain what he might safely give for the property, no doubt he would, and ought, prudently to anticipate the future as well as regard the past, and yet should he give more than the value as indicated by the present income, such enhanced value would be rather speculative than real, depending on a great variety of circumstances and casualties. The anticipation that in a given time in future the property would yield a larger income would be

the inducement to give more than its present actual value. We are not prepared to say that an assessor, making yearly valuations of property for taxation, can or ought to take into consideration anything more than the value of the property at the time he is called upon to value it, since, if it does increase in value in process of time, advantage can be taken of it in future valuations as they may be periodically made. But if he can and does look to the future for the purpose of ascertaining the present value of property, he should do it with extreme caution. In this country, at least, hope is so seductive, and the future so bright and so full of promise, there is the greatest danger that the most prudent may be mistaken, and the most considerate be misled; and it is much safer to rely upon practical demonstration to determine the present value of such property, rather than speculatively enter into the unknown future, whose dark veil it is not given to us to lift and look beyond. It is safer, surely, to say that when the future shall be revealed, and practically exhibit an increased value of the property, then would be the proper time to assess it at such increased value.

To illustrate the argument by the counsel for the state, that the income of the road afforded no criterion for determining its value, it was said that an uncultivated tract of land was always worth something, and often very valuable, when producing no income. This is very true, but why? It is because the land has a capacity to produce an income whenever the owner shall desire to cultivate it, and put it up to the top of that capacity. It was in proof that the railroad was already put to the extent of its capacity to yield income, and producing the utmost it can now be made to produce. If the road was lying idle, there would then be a proper comparison between it and an uncultivated tract of land or farm. If the farm is cultivated to the extent of its power of production, as the road is, the income of the farm would be a criterion of its value. It is often the case that a farm has a fanciful value, beyond and apart from its productive capacity. It may have beautiful scenery, it may have grottoes and fountains, and groves, and well fitted to be the abode of luxury and pride, or adjoin a growing city or town; but railroads and farms are not generally luxuries, or the offspring or seats of pride, and are only valuable from their power to produce income. They are matters of mere utility, and nothing else. When property is in a condition to develop its full productiveness, it is then only that such pro-

ductiveness can be relied upon as exhibiting its real value. If a railroad has only one half the rolling stock required for its business, its productiveness would be delusive as a criterion of value. In such a case, the assessor would very properly inquire what would be the value of the property, if fully equipped to do a maximum business, and consider the result of such inquiry in determining its present value. This road is doing its best, and it is proved it has no net income—no profit on its costs, and is not a good investment at a value greater than that fixed by its owners, and proved on this trial. In process of time it may produce a greater income, when its value for taxation will be fixed proportionably higher. Under the law, it must be valued and assessed every year, and whenever it shall produce twice as great an income as it does at present, it will be valued, of course, twice as high. Then, too, may arise the necessity, if it ever can arise, of determining the other question, whether, in any event, the company are liable to the state for anything beyond seven per cent of the gross earnings of their road. We decide now only the case before us, as made in the declaration filed by the state, and the pleadings of the parties. We do not wish to be understood as asserting that the productiveness of property when fully improved is an absolute standard of valuation, but that it forms a very important element in ascertaining its actual value. In connection with this, and possibly of even greater importance in forming a just opinion of real value, would be the inquiry, What would prudent men give for the property, as a permanent investment, with a view to present and future income? Both these elements were taken into the consideration of the witnesses in this case, and weighed with the court in making up its judgment. It is admitted by the auditor that the company has overpaid all that was due from it to the state, on the valuation of their property as established by the testimony. The company makes no claim for the overplus. The judgment of the court is, therefore, in favor of the defendants, that they are not indebted to the state for any portion of the taxes of 1857, but have fully paid and discharged the same.

Judgment for the defendant.

THE PRINCIPAL CASE IS COMMENTED UPON in *Chicago etc. R'y v. Supervisors of Boone Co.*, 44 Ill. 247, in regard to the manner of taxing railroad property.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

ROSE v. TEEPLE.

[16 INDIANA, 57.]

MAKER OF PROMISSORY NOTE IS ESTOPPED FROM SETTING UP ANY DEFENSE against one who has taken an assignment of the note upon the faith of the maker's statement to him that he had no defense against the note. He is also estopped from setting up a defense to the note under such circumstances against such person's assignee.

ACTION upon promissory note. The facts are stated in the opinion.

James Bradley and D. J. Woodward, for the appellant.

J. B. Niles, for the appellee.

By Court, DAVISON, J. John P. Teeple sued David Rose upon a promissory note for the payment of one thousand one hundred dollars. The note bears date June 29, 1854, was payable to Norman Lewis & Co., at twelve months, and by them indorsed to one Abijah Wallace, who indorsed it to the plaintiff. Defendant answered by five paragraphs. As the third and the reply thereto sufficiently raise the only point made in the case, the other paragraphs will not be further noticed. The third paragraph alleges that the note was given to Norman Lewis & Co., the payees, for sheep sold by them to the defendant; that they represented to him that they brought the sheep from Vermont, and that they were sound and free from disease; when, in truth, they were not sound, but were infected with a disease called "foot-rot," by which they became wholly valueless. That defendant at the time was ignorant of the disease

with which the sheep were infected; that the payees represented themselves as dealers in sheep, and well acquainted with them and their diseases, and that defendant in making the purchase and giving the note relied on their representations. It is averred that the plaintiff, when he purchased the note, well knew that defendant had, or claimed to have, a defense to it.

Plaintiff replied: 1. By a general denial; 2. That shortly after the making of the note, and before it became due, Lewis & Co., the payees, proposed to sell the note to Abijah Wallace for nine hundred and fifty-four dollars in cash; that Wallace was willing to purchase it at that price, provided the defendant had no defense to it, and thereupon, with a view to purchase said note, he, Wallace, called on the defendant, informed him of the pending negotiation, and that he would purchase the note if it was all right, and would be paid without objection when due, and inquired of him whether there would be any defense made to the note. To which inquiry the defendant then answered, and informed Wallace that said note was all right—would be paid when due, and that he might safely purchase it. And thereupon Wallace, relying on said representations, bought the note of the payees, and in good faith paid them nine hundred and fifty-four dollars for the same, took an assignment of the note, and afterward sold and assigned it to the plaintiff.

Defendant demurred to this paragraph of the reply; but the demurrer was overruled, and he excepted. The issues were then submitted to a jury, who found for the plaintiff, and the court, having refused a new trial, rendered judgment on the verdict.

It is conceded that the facts stated in the reply would be, in a suit upon the note by Wallace against the maker, sufficient to estop the maker from setting up the matter alleged in the third defense, but contended "that such estoppel is available only in favor of him to whom the admissions constituting the estoppel were made; because he has acted upon it, and placed himself in a position which he otherwise would not have assumed." This exposition seems to be incorrect. The note, while in the hands of Wallace, was still assignable. He had a right to use it in the payment of his debts, or to raise money by selling or pledging it; and in making such use, or sale of the note, he is entitled to the full benefit derived from the estoppel. But this cannot be, unless such estoppel is held to

operate in favor of his assignee or vendee, because, if it does not so operate, the value of the note while in his hands would be materially decreased. We are of opinion that the position of the plaintiff may be assimilated to that of a purchaser of land with notice of an equitable claim, from one who was a *bona fide* purchaser, for a valuable consideration, without notice. In such case, the purchaser with notice is protected, "for otherwise such *bona fide* purchaser would not enjoy the full benefit of his own unexceptionable title. Indeed, he would be deprived of the marketable value of such title." 1 Story's Eq. Jur., secs. 409, 410. Upon the principle thus enunciated, it seems to us that the estoppel, in this instance, is as effective in favor of the plaintiff as if the suit had been instituted in the name of his assignor.

The judgment is affirmed, with three per cent damages, and costs.

MAKER'S ACKNOWLEDGMENT THAT HE HAS NO DEFENSE TO HIS NOTE, effect of, as to purchaser or his assignee: *Maury v. Coleman*, 60 Am. Dec. 478; *Weaver v. Lynch*, 64 Id. 713, and cases cited in note thereto 715.

THE PRINCIPAL CASE WAS CITED in *Rose v. Hurley*, 39 Ind. 83, and *Anderson v. Hubble*, 93 Id. 577, to the points stated in the *syllabus*, *supra*.

STATE EX REL. BROWN v. BAILEY.

[16 INDIANA, 46.]

PUBLICATION OF STATUTE IS EFFECTED UNDER INDIANA CONSTITUTION, when the act is distributed, by the secretary of state, in a bound volume, in all the counties of the state.

PROVISIONS AS TO FORM OF BINDING, COLOR OF MATERIALS, ETC., OF STATUTES, ARE DIRECTORY ONLY, and failure of strict compliance with such provisions will not render the distribution of such statutes as are prepared and distributed any the less a publication of them.

WHETHER STATUTE IS IN FORCE AT GIVEN TIME IS QUESTION FOR COURT to determine by judicial knowledge.

EIGHT AND ONE HALF MONTHS IS AMPLE TIME TO ENABLE SECRETARY OF STATE TO PUBLISH AND DISTRIBUTE SPECIFIED LAWS, and courts will presume that he has done so, where he has been lawfully directed to do it.

LEGISLATURE MAY, BY JOINT RESOLUTION, DIRECT SECRETARY OF STATE as to the proper discharge of his official duties.

QUO WARRANTO MAY BE SUSTAINED AGAINST CORPORATIONS WHEN.—Filing false and fraudulent articles of association is a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation.

QUO WARRANTO AGAINST CORPORATION, WHEN NOT SUSTAINABLE.—Present insolvency is not a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation.

PRAYER FOR RELIEF AT CLOSE OF INFORMATION CONTAINING SEVERAL PARAGRAPHS must be taken distributively, and applied severally to the paragraphs.

REAL ESTATE SUBSCRIPTIONS CANNOT, IT SEEMS, BE TAKEN UPON PRELIMINARY ARTICLES OF INCORPORATION; but perhaps the board of directors when constituted, and being authorized to receive real estate, may accept it in payment of such preliminary subscriptions.

CONSOLIDATION OF CORPORATIONS CAN ONLY TAKE PLACE WITH CONSENT OF LEGISLATURE; and when a consolidation is thus affected, it amounts to a surrender of the old charters, and the formation of a new corporation out of such parts of the old as enter into the new.

STOCKHOLDERS IN CORPORATIONS WISHING TO CONSOLIDATE ARE ENTITLED TO WITHDRAW their shares of the capital stock, and may enjoin till they are secured.

ON DISSOLUTION OF LEGAL CORPORATION, ITS PERSONAL AND REAL PROPERTY BECOME ASSETS for the payment of its debts and distribution among the stockholders.

INFORMATION in the nature of a *quo warranto*. The facts are stated in the opinion.

Jeremiah Smith, John Davis, Silas Colgrove, J. W. Gordon, and A. H. Connor, for the state.

O. P. Morton, W. Z. Stuart, W. A. Peele, and A. L. Roache, for the appellees.

By Court, PERKINS, J. Information in the Randolph circuit court, in the nature of a *quo warranto*, filed by the prosecuting attorney, in the name of the state, against certain persons who, it is alleged, are claiming to be a railroad corporation, and assuming to act as such, without being organized according to law.

The information is composed of four paragraphs.

The first charges that the defendants pretended to organize as a corporation, on February 25, 1853, and are assuming to act under the organization then made; while, at that time, there was no law in force, nor was there till May 6th, then next following, permitting such organization as that made. The second and third paragraphs charge the filing in the office of the secretary of state of false and fraudulent articles of association, whereby the corporation was claimed to be organized. The fourth charges present insolvency of the corporation. A demurrer was sustained below to all the paragraphs of the information.

The paragraphs must be examined separately. We commence with the first: it charges that the organization of the corporation was perfected prior to the taking effect of the law authorizing it.

Waiving the question whether, if the fact be as alleged, that organization was not a continuous one, which the law operated upon, and made good when it came into force, the members of the organization not withdrawing nor dissenting, we proceed to inquire when the general railroad law of 1852 took effect.

The new constitution, under which that law was enacted, provides that laws, except in cases of emergency, shall take effect from the time when they are distributed, by authority, in all the counties of the state: *Jones v. Cavins*, 4 Ind. 305. It seems to be necessary here, then, to ascertain the person or persons who had authority to distribute the statutes enacted by the legislature. This is not a thing of difficulty. The code of 1843, and that of 1852, alike provide that the distribution shall be made by the secretary of state: R. S. 1843, p. 158; 1 R. S. 1852, p. 436.

Whenever, then, the acts, or any portion of them, of a session of the legislature are distributed in a bound volume, in a manner and shape not substantially contrary to the statute on that subject, in all the counties of the state, by the secretary of state, through his agents appointed for that purpose, they are distributed or published by authority. The fact that directory provisions as to form of binding, character or color of materials, division into volumes, etc., may not be strictly followed by the secretary, does not render the distribution of such as are prepared and distributed by him any the less a publication by authority.

When, then, was the general railroad law of 1852 distributed in all the counties of the state, by authority? In other words, when did the statute constituting that law become the law of the state? This is a question for the court to determine by judicial knowledge, not by evidence given on the trial of a cause. If it were to be determined as a fact, by evidence, on the trial of each cause, then a law might be decided in force upon one trial, and not in force upon another, in which the evidence touching the fact might differ from that upon the former trial. The inconvenience, the confusion, that would result from making the coming into force of a statute a question of fact for the jury, has led to the adoption of the principle everywhere, that it shall be a question of law for the judicial knowledge of the court. The court informs itself as best it can. Now, it takes judicial knowledge of the proclamation of the governor, as to the time when the general volume of biennial statutes takes effect: Ind. Dig. 343.

So, whether a statute has been constitutionally enacted or not; in short, the question whether a statute is, at any given time, a law or not, is for the court: Sedgwick on Stat. and Const. Law, 67, 68; *Id.*, 82, 84; Dwarris, quoted by Sedgwick, p. 118; *State v. Dunning*, 9 Ind. 20; 1 Greenl. Ev., sec. 4; *Elliot v. Ray*, 2 Blackf. 31; *Evans v. Adams*, 4 Id. 54, note; Ind. Dig. 265; *McCulloch v. State*, 11 Ind. 424.

The revised code of 1852, as a whole, did not take effect, as the court from its judicial knowledge has already decided, till May 6, 1853: *Jones v. Cavins*, 4 Ind. 305. Did the railroad act take effect at an earlier date? It contained no emergency clause. Nor did it require that the secretary of state should publish it in advance of the other acts of the session. But on June 9, 1852, the legislature passed a joint resolution, which was approved by the governor, instructing the secretary of state to publish the statute in question, with four others, bound together in proper binding, as soon as convenient: Acts 1852, p. 178. The act in 1 Revised Statutes 1852, page 348, was not in force till May 6, 1853. If the court is to presume that the secretary acted in obedience to the joint resolution above referred to, then it will have to presume that the acts mentioned were in force before February 25, 1853; because, by reasonable diligence, the secretary could have caused their legal distribution long before that time.

Will the court presume that the secretary acted under the resolution? Such presumption must be indulged if the resolution was a legal expression of the wish of the legislature. It is said that a bill, not a joint resolution, was the necessary vehicle for conveying the direction of the legislature to the secretary.

The new constitution ordains that "no law shall be enacted except by bill:" Art. 4, sec. 1. And it is assumed by counsel for the state that the direction given by the joint resolution could only have been given by a law, and that the joint resolution was not such.

The old constitution provided that the style of laws should be, "Be it enacted by," etc.; and yet such was not the style of joint resolutions, and hence it may be argued that under the old constitution joint resolutions were not laws: Const. 1816, art. 3, sec. 18.

Mr. Cushing, in his Law of Legislative Assemblies, section 2403, says: "A form of legislation which is in frequent use in this country, chiefly for administrative purposes of a local or

temporary character, sometimes for private purposes only, is variously known in our legislative assemblies as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. In congress, a joint resolution which is the name given in that body to this kind of legislation, is there regarded as a bill."

But we shall not attempt a definition of a joint resolution. It will be sufficient for our present purpose to say that, be it what it may, our constitution recognizes it as a means for the expression of the legislative will (art. 4, secs. 18, 20, 25), and by which some acts may be authoritatively performed by the legislature. That body may adjourn for more than three days by such resolution (art. 4, sec. 10); perhaps grant a pardon (art. 5, sec. 17); perhaps suspend the operation of a law (art. 1, sec. 26). It may remove the secretary of state from office for negligence in the discharge of his duty by a joint resolution: Art. 6, sec. 7; see 2 Story on Const., 2d ed., 565, note.

Now perhaps the secretary, in the exercise of his general power to distribute the laws as soon as convenient, might have distributed them by volumes, when severally prepared, without waiting till all the volumes into which they might be divided were bound and ready for distribution; still the court could not judicially take notice of such action, and hence would not declare the laws thus distributed in force. But the court will take notice of the joint resolution, and through it, of the action of the secretary under it, if the joint resolution was a legal expression of the legislative will; and we think it was. It directed the secretary in regard simply to the discharge of an administrative duty—a duty which the legislature had been in the habit of directing the manner of discharging, by joint resolution, since the first organization of a territorial government in Indiana. See the code of 1807, and annual acts from that time till the passage of the joint resolution in question. Indeed, it would seem too plain for argument, that, as the legislature is made the judge, by the constitution, of the proper discharge of his duty by the secretary, when determining whether he shall be removed for a negligent discharge, so that body, by implication, has the power of directing him as to a proper discharge of his duty while acting as secretary.

We think the railroad law was in force before February 25, 1853.

The second and third paragraphs of the information charge a fraudulent organization, and we think allege facts sufficient to sustain the information on the part of the state. They could not have been set up by a contractor in defense to a suit by the corporation. He would have been estopped by his contract: See *Buffalo and P. Railroad Co. v. Hatch*, 20 N. Y. 157; *Hubbard v. Chappel*, 14 Ind. 601; *Bank of Toledo v. International Bank*, 21 N. Y. 542.

The fourth paragraph, charging simply present insolvency, we do not think sufficient: See *Danville P. R. Co. v. State*, 16 Ind. 456; *State Bank v. State*, 1 Blackf. 267; *John v. Farmers' and M. Bank*, 2 Id. 369 [20 Am. Dec. 119]; and the elaborate case of *Eastern A. Co. v. Regina*, 22 Eng. L. & Eq. 328; S. C., 18 Id. 167; *Smith v. City of Madison*, 7 Ind. 90; Ind. Pr. 565.

It is argued, because the prayer for relief is not added to each paragraph of the information, that those paragraphs are defective; but we think the prayer for relief at the close of the information should be taken distributively, and applied severally to the paragraphs.

A word or two upon other points.

As the directors of the corporation alone are authorized to receive real estate, and as they are not elected till after the subscriptions to preliminary articles are complete, it would seem that real estate subscriptions could not be taken upon such articles. But perhaps the directors, when in power, would have the right to receive, in good faith, payment in real estate of any subscription, if it appeared advantageous to the corporation to take it, in the given case: See *Buffalo and P. Railroad Co. v. Hatch*, 20 N. Y. 157.

The question of the power of corporations to consolidate has been discussed. It is held in *Lauman v. Lebanon V. Railroad Co.*, 30 Pa. St. 42 [72 Am. Dec. 685], that such consolidation can take place with the consent of the legislature; that it amounts to a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new; but that those stockholders in the old who do not enter the new are entitled to withdraw their shares of the capital stock, and may enjoin till they are secured to them: See *McCray v. Junction R. R. Co.*, 9 Ind. 358, 359; see *Grant*

on Corporations, 19, note c. It may be observed, further, that the supreme court of the United States, in *Bacon v. Robertson*, 18 How. 480, has held that on the dissolution of a once legal corporation, its personal and real property becomes assets for the payment of its debts and distribution among the stockholders, contrary to the doctrine asserted in most elementary works; and in *State Bank v. State*, 1 Blackf. 267 [12 Am. Dec. 234]. This doctrine seems to us to be right: See *Blake v. Holley*, 14 Ind. 383, and *Hardy v. Merriweather*, Id. 203.

The judgment is reversed, with costs. Cause remanded, etc.

REPORTS AND RESOLUTIONS OF LEGISLATURE, DIRECTORY EFFORT OF, as to officers and agents of the state: *Pinckney v. Henegan*, 49 Am. Dec. 592.

QUO WARRANTO AGAINST CORPORATIONS: See extended note to *People v. Besselaer and Saratoga R. R. Co.*, 30 Am. Dec. 48; *State v. Bank of Charleston*, 29 Id. 135; *State v. Real Estate Bank*, 41 Id. 109.

CORPORATION CANNOT CONSOLIDATE WITH ANOTHER CORPORATION without legislative authority: See *Lauman v. Lebanon Valley R. R. Co.*, 72 Am. Dec. 685; *McMahan v. Morrison*, post, p. 418, and note thereto.

THE PRINCIPAL CASE WAS FOLLOWED in *Matlock v. Indiana and Illinois Cent. R. R. Co.*, 16 Ind. 176. It was cited in each of the following authorities and to the point stated: An information in the nature of a *quo warranto*, against a plank-road company, charging a forfeiture of its franchises, ought to show under what statute the company was organized and acting; otherwise, the court is blind to the law applicable to the given case, and a demurrer to the information will be sustained: *Danville etc. Plank Road Co. v. State*, Id. 456. That an act never passed both houses of the legislature, and consequently never became operative as a law, may be determined by an inspection of the journals of that body, to which the court has a right to look: *Cordell v. State*, 22 Id. 4. Money cannot be appropriated by joint resolution, nor can the auditor of state issue a warrant for money so appropriated. And nothing really decided in the principal case is in conflict with this doctrine: *May v. Rice*, 91 Id. 556. The principal case was briefly reviewed in *State v. Kimball*, 1 Wils. 192, where, in the case itself, and notes thereto, some law is given as to the effect of joint resolutions.

NILL v. COMPARET.

[16 INDIANA, 107.]

EFFECT OF APPEAL TO COURT OF ERROR, WHEN PERFECTED, IS ONLY TO STAY EXECUTION upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, is binding upon the parties, as to every question directly decided.

ACTION UPON JUDGMENT IS NOT BARRED BY FACT that the judgment has been removed by writ of error to a superior court.

ACTION upon promissory note. The facts are stated in the opinion.

William H. Combs, for the appellant.

Withers and Morris, for the appellee.

By Court, DAVISON, J. The appellee, who was the plaintiff, sued Nill and Miller upon a promissory note for the payment of three hundred and eleven dollars. The note bears date February 1, 1858, and was payable to one Thomas Meegan, who assigned it to the plaintiff. Defendants' answer contains five paragraphs, to which the plaintiff replied. There was a verdict for the plaintiff, upon which the court, over a motion for a new trial, rendered judgment. This case is before us upon a reserved question of law, arising upon a demurrer to the reply to the fourth and fifth paragraphs of the answer.

The fourth paragraph alleges that Meegan, before he assigned the note, was and still is indebted to Nill seven hundred dollars upon an account, which is filed with the pleading, and offered as a set-off against the plaintiff's demand. The fifth states these facts: Nill is the principal in the note in suit, and Miller is his surety. During the year ending in May, 1857, Meegan, the assignor of the note, was the city treasurer of Fort Wayne, and Nill became his immediate successor in office. In that month, he was qualified as such successor, when it became the duty of Meegan to pay over to him, Nill, any balance then in the city treasury. At that time, Meegan represented to Nill that there was a balance of seven hundred and eighty-one dollars, then on deposit in Hamilton's bank, in the city of Fort Wayne; and Nill, relying on his representation, receipted to him, Meegan, for that amount as such treasurer, and took from him authority to draw the same out of the bank. After Nill became treasurer, Meegan continued to perform the duties of the office as Nill's deputy, and still continued to deposit moneys received into the city treasury in Hamilton's bank. At the time the note sued on was given, Nill was not advised of the true state of the bank account, or of the state of the deposits therein; and it was then stipulated that they, Meegan and Nill, should subsequently meet and settle that account, and if any balance should be found due to Nill, the same should stand as a credit on said note. As stipulated, the parties met, and upon examination of said accounts a balance of three hundred and twenty-five dollars was found due from Meegan to Nill; and Meegan having refused to

credit the note with the amount so found due, the same is therefore a proper set-off in this action. It is averred that Comparet, the assignee, had, at the time of the assignment, full notice of Nill's claim against Meegan.

To these defenses, the plaintiff replied that on April 10, 1858, an action was pending in the Allen common pleas, wherein the present plaintiff was then plaintiff, and the present defendants were then defendants, in which action so pending, the same identical matters in said defenses contained were pleaded by said Nill in said last-mentioned action as a set-off to the cause of action then set forth in the plaintiff's complaint. That such proceedings were had in said action, that the same court at its April term, 1858, adjudged and determined that Meegan was not indebted to Nill, as alleged, and that the defendants, as to the matter so pleaded, take nothing as against the plaintiff; from which judgment and determination Nill and Miller, the then and now defendants, appealed to the supreme court, where that cause is now pending; wherefore, etc. Defendants demurred to this reply; but their demurrer was overruled, and they excepted. Against this ruling, it is insisted that the appeal having been perfected, the judgment appealed from became inoperative during the pendency of the appeal in the supreme court, and the matter determined in the action, in which the judgment was rendered, ceased to be *res adjudicata*. This position is not, in our opinion, correct. Indeed, the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, stands binding upon the parties as to every question directly decided: *Cole v. Connolly*, 16 Ala. 271. And it has been expressly decided that "it is no bar to an action upon a judgment that the judgment has been removed by writ of error to a superior court:" *Suydam v. Hoyt*, 25 N. J. L. 230. The reply seems to be well pleaded, and must be held effective.

The judgment is affirmed, with five per cent damages, and costs.

EFFECT OF APPEAL OR WRIT OF ERROR UPON JUDGMENT OF COURT BELOW: See *Planters' Bank v. Calvit*, 41 Am. Dec. 616, and note 625; *State v. McIntyre*, 59 Id. 566, and note 572; cases cited in note to *Bank of North America v. Wheeler*, 73 Id. 688.

AT COMMON LAW, PARTY HAS RIGHT OF ACTION UPON HIS JUDGMENT as soon as it is recovered: See note to *Lee v. Giles*, 21 Am. Dec. 479.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: That the only effect of an appeal to a court of error, when perfected, is as stated in the first point of the *syllabus*, *supra*, see *Burton v. Reeds*, 20 Ind. 92; *Burton v. Burton*, 28 Id. 343; *Walls v. Palmer*, 64 Id. 496; *Randles v. Randles*, 67 Id. 439; *State v. King*, 94 Id. 371. An appeal does not impair the force of a judgment, although it stays its execution: *Scheible v. Slagle*, 89 Id. 323. It remains in full force: *Padgett v. State*, 93 Id. 397. The fact that a judgment has been removed by appeal to a court of error is no bar to an action upon it: *Burton v. Reeds*, 20 Id. 92. An appeal from an order of injunction stays proceedings on the order, but not in such a sense as to allow the party enjoined to do the act which he has been forbidden by the injunction to do: *State v. Chase*, 41 Ind. 362.

HILL v. JAMIESON.

[16 INDIANA, 125.]

ERRORS OF LAW AT TRIAL ARE WAIVED, unless brought to the attention of the court on a motion for a new trial.

PLEADING STRICKEN OUT ON MOTION IS NO PART OF RECORD, unless made so by bill of exceptions. In the absence of such a pleading before the appellate court, the ruling of the court below will be presumed to be correct.

EXAMPLE OF PERSONAL CONTRACT NOT WITHIN STATUTE OF FRAUDS.—A personal contract, as one for personal services, for an indefinite period, or a term of years, and which will terminate with the death of the party making it, is not within the subdivision of the statute of frauds requiring contracts not to be performed within a year to be reduced to writing; because such a contract might, by the death of the party, be fully performed within one year.

MOTION FOR JUDGMENT UPON PLEADINGS IS NO PART OF RECORD, unless made so by a bill of exceptions, or by the order of the court. This question cannot be raised for the first time in an appellate court.

WHEN AMENDED ANSWER IS STRICKEN FROM FILES, ORIGINAL ANSWER STANDS as if no amended answer had been filed.

ACTION ON TWO PROMISSORY NOTES. The facts are stated in the opinion.

L. C. Jacoby, for the appellants.

Withers and Morris, for the appellee.

By Court, WORDEN, J. This was an action by Jamieson against Hill and Jacobs, upon two promissory notes given by the appellants to one Anderson, and by him indorsed to the plaintiff. Trial by jury. Verdict and judgment for the plaintiff. The defendants appeal and assign eight errors, which will be noticed in the order in which they are assigned:

1. The court erred in not compelling the plaintiff to make true and perfect answers to interrogatories propounded to him.

If any error was committed in this respect, it was waived by the appellants, as no new trial was asked upon this ground: *Kent v. Lawson*, 12 Ind. 675 [74 Am. Dec. 233]

2 and 3. These assignments are based upon instructions assumed to have been given by the court to the jury. No instructions are in the record; hence no question is presented by these assignments.

4. The court erred in striking the amended answer from the files.

The defendants filed an answer of five paragraphs, the third of which was afterward amended, upon which issue was taken. The cause being about to be continued at one term, the defendants asked and obtained leave to amend their entire answer. At the next term, they filed their amended answer, which, on the plaintiff's motion, was stricken from the files; for what reason does not appear. A paper, purporting to be such amended answer, is set out in the record; but it constitutes no part of the record, not having been made such by bill of exceptions: *Saunders v. Heaton*, 12 Ind. 20; *Chrisman v. Melne*, 6 Id. 487. The rejected pleading, not being before us, we cannot notice it; and therefore cannot determine whether it was such a pleading as should or should not have been rejected; but we must presume in favor of the ruling of the court below.

5. The court erred in not granting a new trial.

It is urged that there should have been a new trial, and that the verdict should have been rendered for the defendants, because the notes sued were given for a consideration in part void by the statute of frauds; and that there could be no apportionment. The notes seem to have been given for musical instruments sold by Anderson to the defendants, and the goodwill of the trade in those instruments, before that time carried on by Anderson, with an alleged agreement on his part to aid and assist the defendants in the sale of the instruments; and that he would not thereafter sell, or aid in selling, such instruments, either for himself or for others, except said defendants. These stipulations on the part of Anderson forming an indefinite part of the consideration of the notes, and being, as is claimed, void by the statute of frauds, not being in writing, it is insisted that no recovery can be had upon the notes at all. Without stopping to inquire whether the conclusion follows from the premises, we proceed to ascertain whether the stipulations on the part of Anderson are within the statute of frauds. We suppose reference is had to that portion of the statute

which requires contracts not to be performed within a year to be reduced to writing.

The stipulations of Anderson were personal, and could devolve no liability upon his representatives for a breach after his death. His death would terminate the contract, however soon after the making thereof that event might have happened. His death might have taken place within a year, and in that event his contract might have been fully performed within the year. It is clear enough, upon the authorities, that such a contract is not within the statute. Thus it is said by a late writer: "A parol contract to support a person for a certain number of years, or to deliver goods at the return of a particular ship, is not within the statute. For in the one case, the person may die within a year, and if supported under the contract until his death, the contract will be fully performed; and in the other case, the ship may possibly return within a year; and though, in point of fact, it remain abroad five years, that can make no difference, since it is not understood that the contract is not to be performed within the year." Bateman on Commercial Law, sec. 209. *Wiggins v. Keizer*, 6 Ind. 252, is also in point. We do not perceive any particular in which the evidence is not sufficient to sustain the verdict.

6. The court erred in not pronouncing judgment for the defendants, on the state of the pleadings. We find in the transcript a statement of the clerk that such a motion was made by the defendants, and overruled and exception taken. The pleadings stood as follows: The defendants had filed an answer of five paragraphs, the first of which was a denial, and the other four set up affirmative matter. The plaintiff replied in denial of the latter four. Afterward the defendant obtained leave to amend their third paragraph, and upon the same being filed as amended, the plaintiff replied thereto by way of special denial, and afterward withdrew his special denial. In this state of the pleadings, the cause was tried. The question thus arising is, whether the original denial of the third paragraph is to be considered as remaining, and putting in issue the third paragraph as amended, after a special denial had been filed to it and withdrawn. We see no particular harm in permitting the original denial to be considered as traversing the amended paragraph, if the parties so understood it. If the defendants did not so understand it, it is but natural to suppose that they would have taken a rule to reply, or other steps to put the cause at issue, after the withdrawal of the special denial. But

we decide nothing upon this question, as we think it is not properly before us. Such motions constitute no part of the record, unless made so by bill of exceptions, or the order of the court: 2 R. S., sec. 559, p. 159; *Kirby v. Cannon*, 9 Ind. 371; Ind. Dig., sec. 497, p. 692.

No bill of exceptions or order of the court shows that such a motion was made, or that the defendants sought in any manner to take advantage, in the court below, of the alleged defect; and as settled by repeated decisions, they cannot raise the question for the first time in this court.

7. The court erred in admitting improper evidence at the trial. The items of evidence pointed out in the brief of counsel as objectionable are the protests of the notes for non-payment; for the costs of which they contend, and perhaps very properly, they should not be liable. It is a sufficient answer to this assignment to say that the record does not show that the defendants objected to the introduction of the protests; though it shows that they did object to the introduction of the notes and indorsements, without assigning any reason for the objection, which was overruled.

8. The court erred in trying the cause by a jury, when there was no issue made.

The appellants contend that when they, upon leave obtained, filed their amended answer, which was stricken from the files, the cause was left without any answer, and hence that there was no issue to try; no pleadings except the complaint. We think differently. It seems to us that when the amended answer was stricken from the files, the original answer stood as if no amended answer had been filed. But were this not so, no advantage was sought to be taken, or objection made, in the court below, and the objection cannot be successfully made for the first time here.

The judgment is affirmed, with costs, and two per cent damages.

APPELLATE COURT WILL NOT DECIDE UPON ADMISSIBILITY OF RECORD OF COURT, when bill of exceptions does not disclose its contents: *Sanford v. Howard*, 68 Am. Dec. 101, and note 108, showing that error will not be noticed unless it is apparent from the record. Where no bill of exceptions to the opinion of the trial judge is taken, the question is not properly before an appellate court for its decision, and any opinion it might express thereon would be extrajudicial: *Allaire v. Hartshorne*, 47 Id. 175.

AS GENERAL RULE, NO QUESTIONS CAN BE CONSIDERED ON MOTION FOR NEW TRIAL, except those that were raised at the trial: *Fitzpatrick v. Fitzpatrick*, 75 Am. Dec. 681.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: An agreement which may be performed within a year by the death of a party to the contract is not affected by that provision of the statute of frauds requiring contracts not to be performed within a year to be reduced to writing: *Bell v. Hewitt's Ex'rs*, 24 Ind. 282; *Frost v. Tarr*, 53 Id. 393. A promise not to engage in a rival business is not within the statute of frauds: *Wels v. Rhodius*, 87 Id. 12. Unless there is a bill of exceptions making parts of a pleading stricken out on motion a part of the record, the questions, as to the correctness of the ruling of the court below on striking out, cannot be considered by an appellate court: *Maguire v. Smock*, 1 Wils. 98. The same is true where a cross-complaint has been so stricken out: *Baker v. Arctic Ditchers*, 54 Ind. 312. The same is true of any pleading which has been stricken out on motion. The court cannot judicially notice merely because the clerk has copied it into the record. It must be replaced in the record by bill of exceptions: *Sherman v. Nixon*, 37 Id. 154.

McMAHAN v. MORRISON.

[16 INDIANA, 172.]

LEGISLATIVE CONSENT TO CONSOLIDATION OF EXISTING CORPORATIONS HAS EFFECT of dissolving the former corporations, and at the same instant of creating a new corporation, with property, liabilities, and stockholders derived from the old, upon such terms and conditions as may be prescribed by the act of consolidation.

CORPORATION MAY BE DISSOLVED BY SURRENDER OF ITS FRANCHISE, and an acceptance thereof by the legislature.

PRECEDENT DEBT CONSTITUTES VALUABLE CONSIDERATION FOR CONVEYANCE. OWNER OF PROPERTY CAN SELL IT AND GIVE GOOD TITLE TO BONA FIDE PURCHASER despite his creditors, up to the time when they shall have acquired a lien.

CREDITOR OF OLD CORPORATION TAKING JUDGMENT ON HIS DEBT AGAINST CONSOLIDATED COMPANY into which the old corporation has been merged, cannot enforce his judgment against real estate of the old company conveyed to *bona fide* purchasers before the recovery of his judgment.

THE facts are stated in the opinion.

J. B. Julian, for the appellant.

O. P. Morton, J. F. Kibbey, J. S. Newman, and J. P. Siddall, for the appellees.

By Court, PERKINS, J. On April 13, 1854, the Cincinnati, Newcastle, and Michigan Railroad Company, the Cincinnati, Logansport, and Chicago Railway Company, and the Cincinnati, Cambridge City, and Chicago Short Line Railroad Company consolidated into a new corporation, styled the Cincinnati and Chicago Railway Company. As the legislature, by an act, had given its consent to such consolidation, the effect of it, under the act and terms of consolidation, was a dissolution

of the three corporations named, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence. A corporation may be dissolved by a surrender of its franchises, and the acceptance of them by the legislature: *Lau-man v. Lebanon V. R. R. Co.*, 30 Pa. St. 42 [72 Am. Dec. 685]. At the date of this consolidation, the plaintiff, McMahan, had a suit pending against the Cincinnati and Cambridge City company to recover a demand that company owed him. The same company, at the same, owned a piece of real estate that had been conveyed to it by one John Hawkins. But McMahan, on the substitution of the new company as defendant in place of the Cincinnati and Cambridge company, took his judgment against the new company, viz., the Cincinnati and Chicago company. This judgment he obtained on April 14, 1856.

Two years before the rendition of this judgment, however, the Cincinnati and Chicago company, having succeeded to the property of the Cincinnati and Cambridge company, as well as to that of the others consolidating, had conveyed the Hawkins lot above mentioned to Morrison, Blanchard, & Co., to pay a debt due to them, originally, from the Cincinnati and Logansport company.

McMahan now contends that this lot is liable for the debts which were owing by the Cincinnati and Cambridge company at the time of the consolidation, the lot being then the property of that company; and hence, he sues Morrison, Blanchard, & Co., the present owners of the lot, to enforce payment of his judgment, of which mention has been made above.

The court below sustained a demurrer to his complaint, and dismissed his suit. If the property in the Hawkins lot was not transferred to the new company by the act of consolidation, it still remains out of that company and its grantees, and this suit cannot be sustained, because it is not against the proper parties. But if the property in that lot was transferred by the act of consolidation to the new company, then the title to it has been conveyed to Morrison, Blanchard, & Co.; and the question fairly arises, whether it can be made subject, in the hands of those grantees, to the debts formerly owed by the Cincinnati and Cambridge company. Those grantee are *bona fide* purchasers. They had no actual notice of the demand of McMahan. This is conceded. They had no constructive notice. McMahan's pending suit was not in relation to the

Hawkins lot, and hence was no notice to any one except a party to it: Ind. Dig. 594; *Ray v. Roe*, 2 Blackf. 258 [18 Am. Dec. 159]; *Frakes v. Brown*, 2 Id. 295. A precedent debt constitutes a valuable consideration for a conveyance: *Work v. Brayton*, 5 Ind. 397. It is not pretended that any lien had attached to the lot.

We have not to consider, then, how the case might stand had this lot not passed into the hands of innocent purchasers: See *Wright v. Bundy*, 11 Ind. 405. Upon existing facts, the case stands thus: On April 13, 1854, the Cincinnati and Chicago Railroad Company owned a lot of ground, and conveyed it to a *bona fide* purchaser. The company was at the time in debt to other persons, among them McMahan. Two years afterward, viz., on April 14, 1856, he obtained a judgment on his claim against the company; and the question is, Can he enforce it against the lot sold as above? The owner of property can sell it and give a good title to a *bona fide* purchaser, despite his creditors, up to the time when they shall have acquired a lien: *McTaggart v. Rose*, 14 Ind. 230.

We do not see that anything more or less has been done in this case. *Clark v. Rowling*, 3 N. Y. 216 [52 Am. Dec. 290], is cited to show that the court may look behind the judgment against the Cincinnati and Chicago company, to see upon whom and what it should, in equity, be executed. Suppose we admit the power; still, when in the exercise of it, property, as in this case, is found in the hands of an honest purchaser for a valuable consideration, the court will cease its action in such direction: See *Curran v. State of Arkansas*, 15 How. 307; and Am. Law Reg. 536.

As to the rights of a stockholder dissenting to a consolidation, see *Lauman v. Lebanon V. R. R. Co.*, 30 Pa. St. 42 [72 Am. Dec. 685].

The judgment is affirmed, with costs.

CORPORATION MAY BE DISSOLVED by a surrender of its corporate rights: *Slee v. Bloom*, 10 Am. Dec. 273.

CORPORATION CANNOT CONSOLIDATE WITH ANOTHER CORPORATION without legislative authority: See *Lauman v. Lebanon Valley R. R. Co.*, 72 Am. Dec. 695; *State v. Bailey*, ante, p. 405.

PRECEDENT DEBT AS VALUABLE CONSIDERATION: See note to *Bay v. Codrington*, 9 Am. Dec. 272; note to *Lockwood v. Bates*, 12 Id. 136; note to *Earnest v. Parke*, 27 Id. 238; note to *Bank of St. Albans v. Gilliland*, 35 Id. 568.

TITLE ACQUIRED BY BONA FIDE PURCHASER, for valuable consideration, and without notice of claims of others, is good: *Hall v. Delaplaine*, 68 Am.

Dec. 57, and note 64; *Harper v. Bibb*, 69 Id. 397; *Hunter v. Lawrence's Adm'r*, 62 Id. 640; *Carter v. Neal*, 71 Id. 136

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The questions arising in *Dillon v. Dorne*, 19 Ind. 303, were similar to those in the principal case, and the judgment in the former was affirmed for the reasons given in the latter. The fact that a suit is pending against a party does not prevent him from conveying his land, if it be done in good faith: *Lowry v. Howard*, 35 Id. 172; *Sherman v. Hoyland*, 73 Id. 476. A conveyance will not be declared fraudulent, although made when many actions are pending, if made in good faith; nor will the fact that actions are pending be of itself sufficient to overthrow the conveyance; but the fact that an action is pending is always proper for the consideration of the jury, and it is not error to direct their attention to it as one of the circumstances usually attending a conveyance made to defraud creditors: *Sherman v. Hoyland*, *supra*. A precedent debt constitutes a valid consideration for a conveyance or mortgage: *Evans v. Pence*, 78 Id. 441. But this doctrine announced in the principal case has been modified by the subsequent cases of *Busenbrake v. Ramey*, 53 Id. 499, and *Gilchrist v. Gough*, 63 Id. 576, in favor of the equities of third parties. It must not be understood from these cases, however, that a debtor may avoid a conveyance or mortgage given for an antecedent debt; or if he has indorsed notes to his creditor as collateral security for a pre-existing debt, that he may at pleasure repudiate the transaction and reclaim such collaterals: *Evans v. Pence*, *supra*; see also *Robertson v. Cauble*, 57 Id. 420. The court in *Gilchrist v. Gough*, 63 Id. 584, was asked to reconsider the doctrine approved in the principal case and others, that a mortgage of real estate, given to secure a precedent debt, is founded upon a valuable consideration. These cases, said the court, have never been expressly overruled on this point, but that the later case of *Busenbrake v. Ramey*, *supra*, so modified them as to amount to a virtual overruling of previous cases on this point. In the case of *Busenbrake v. Ramey*, *supra*, it was held, in substance, and the court in *Gilchrist v. Gough*, *supra*, thought it correct, that the mortgagee who takes a mortgage to secure a pre-existing debt, the time of payment not being extended, or no securities being surrendered, or nothing of value being parted with, is not a purchaser for a valuable consideration, within the meaning of that expression as used in the law. Numerous cases were cited in support of this view. In a late case, however, the court said that *Gilchrist v. Gough*, *supra*, and other similar cases, are understood to hold that a pre-existing debt is not such a consideration as will make a purchaser a *bona fide* one in such a sense as to cut off prior equities; and that they are not understood to hold that an antecedent debt may not constitute a valuable consideration. "We have no doubt that an antecedent debt is a valuable consideration, and that it will support a mortgage or other contract: *Louthain v. Miller*, 85 Ind. 163. The trouble seems to arise in discriminating and plainly indicating the line between cases where a precedent debt is relied upon to support a contract between the parties, and those where it is relied upon to defeat a prior equity: *Petry v. Ambraker*, 100 Id. 514. So in *Boling v. Howell*, 93 Id. 339, the court quotes from Mr. Bump on fraudulent conveyances as follows: 'When a transfer, however, is made to a creditor, his equity is the same as that of the others, and he is entitled to the benefit of the universal rule, that where the equities are equal the legal title must prevail. An existing indebtedness is, therefore, a good consideration within the proviso which saves the rights of *bona fide* purchasers. There being no equity prior to that of

the vendee, the necessity which calls for a new consideration in other cases does not exist.' . . . This," said the court, "is the rule of our court," citing the principal case among others. "The doctrine of these cases," said the court, "has not been changed, although some of the expressions in one of the opinions have been modified," citing *Gilchrist v. Gough*, *supra*. A county, having authority by the proper vote to take stock in one railroad company, has no right, without another vote, to subscribe for stock in a consolidated company formed by the railroad voted for and another corporation, when the subscription had not been made to the original company. The consolidated company, in such a case, cannot enforce the subscription and issue of aid bonds; and notice of these facts appearing upon the face of the bonds, there can be no such thing as an innocent holder, but the purchaser takes them with actual notice of the illegality, and stands in the same relation to them as the payee, the railroad company, to which they were issued; *City of Mount Vernon v. Hovey*, 52 Ind. 569.

CONSOLIDATION OF CORPORATIONS.—1. DEFINITION OF.—In *State v. Bailey*, *ante*, p. 405, and *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, the term "consolidation," as applied to corporations in the law of this country, is "a surrender of the old charters by companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new." That the legislature may incorporate a new and distinct corporation out of two or more previously existing corporations, and that its powers and privileges may be designated by reference to the charters of other companies as well as by special enumeration, see principal case; *Railroad Co. v. Maine*, 96 U. S. 499; *State v. Maine Cent. R. R. Co.*, 66 Me. 500. The effect of consolidation, as stated in the principal case, works a "dissolution of the corporations previously existing, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence: *Miller and Miss. R. R. Co. v. Lancaster*, 5 Coldw. 514; and the principal case is cited to this point in *Clearwater v. Meredith*, 1 Wall. 40; *Mowrey v. Indianapolis etc. R. R. Co.*, 4 Bias. 85; *State v. Maine Cent. R. R. Co.*, 66 Me. 500; *Shields v. Ohio*, 95 U. S. 324; *Railroad Co. v. Georgia*, 98 Id. 363. In England, the term "amalgamation" is used instead of "consolidation;" and an amalgamation is assumed to be where the existing companies agree to abandon their respective articles of association and regulations, and to register themselves under new articles as one body. This would be a new company formed by the coalition or amalgamation of the companies previously existing: *In re Bank of Hindustan, etc.*, 2 Hen. & M. 666. This definition is supported by *Clinch v. Financial Corp.*, L. R. 4 Ch. App. 117; *In re Empire Assurance Corp.*, L. R. 4 Eq. 341. So in Missouri an amalgamation implies such a consolidation as to reduce the companies to a common interest: *Powell v. North Mo. R. R. Co.*, 42 Mo. 63. In this case, it was also held that where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation: *Id.*

2. POWER TO CONSOLIDATE.—The power of the legislature to confer authority upon existing companies to consolidate or amalgamate is unquestioned: *Clearwater v. Meredith*, 1 Wall. 39; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130; S. C., 24 Id. 455; *Clinch v. Financial Corp.*, L. R. 5 Eq. 450. In

fact, without such authority, corporations organized separately could not merge and consolidate their interests: *Clearweather v. Meredith*, 1 Wall. 39. This authority may be conferred in the original charters: *Nugent v. Supervisors*, 19 Id. 249; or by the provisions of a general or special act of the legislature passed prior to consolidation, and after the organization of the original corporations: *Bishop v. Brainerd*, 28 Conn. 289; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130; S. C., 24 Id. 455; *Southall v. British Mut. L. Ins. Soc.*, L. R. 11 Eq. 65; or even by the express sanction of an unauthorized agreement to consolidate: *McAuley v. Columbus etc. Cent. R'y Co.*, 83 Ill. 348; *Mead v. New York etc. and Northern R. R. Cos.*, 45 Conn. 199. Where two separate corporations are created to build railroads, they have no right, without authority, to unite and conduct their business under one management; nor have they a right to establish a steamboat line, to run in connection with the railroads: *Pearce v. Madison etc. and Peru etc. R. R. Cos.*, 21 How. 441. Such consolidation cannot be rendered effective and valid without the assent of the legislature, either by express grant or necessary implication: *Fisher v. Evansville etc. R. R. Co.*, 7 Ind. 407. A railway company, associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it. An agreement to amalgamate, as from a time past, may possibly, in equity, amount to amalgamation; but an agreement to do so at a future period will not, until that period arrives: *Shrewsbury and B. R'y Co. v. Stour Valley R'y Co.*, 2 DeG. M. & G. 866. In the absence of authority clearly conferred, the amalgamation of companies is an act beyond the scope of their powers, not only of the directors but of the company: *Charlton v. Newcastle etc. R'y Co. and N. E. etc. R'y Co.*, 5 Jur., N. S., 1096; *Blatchford v. Ross*, 5 Abb. Pr., N. S., 434; S. C., 54 Barb. 42. A single shareholder may therefore apply for and obtain an injunction restraining his company from carrying into effect an agreement with another company to amalgamate their lines, where the legislative sanction for such an act has not been obtained: *Charlton v. Newcastle etc. R'y Co. and N. E. etc. R'y Co.*, 5 Jur., N. S., 1096; *Watson v. Harlem and N. Y. Nav. Co.*, 52 How. Pr. 348; *Blatchford v. Ross*, 54 Barb. 42; S. C., 5 Abb. Pr., N. S., 434.

3. STATUTORY POWER TO CONSOLIDATE, HOW CONSTRUED.—Where power is given by statute to one railroad company to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute: *In re Prospect Park etc.*, 67 N. Y. 371. Where a Masonic lodge was in existence before the organization, under statute, of a corporation of the same name borne by said lodge, the lodge is not merged in the corporation: *Mason v. Finch*, 28 Mich. 282. Under the Pennsylvania statute, one railroad company may be formed by the consolidation of several, and constitute a legal incorporation by filing its certificate of consolidation with the secretary of state: *Commonwealth v. Atlantic etc. R'y*, 53 Pa. St. 19. So, in Indiana. Under the statutes of that state, railroad corporations may acquire by purchase, or consolidate with, other or intersecting lines; and the organization of a railroad corporation, with the view of ultimately consolidating, upon equitable terms and in accordance with the provisions of the statute, with one already existing, is not against public policy: *Hill v. Nisbet*, 100 Ind. 341. And in the same state it is held that a railroad company, having power to consolidate with connecting or intersecting lines, may, under the statute, with a view to accomplishing such consolidation and carrying out the object for which it was created, purchase the stock of such other roads. There can be no valid action as a consolidated corporation until conditions precedent,

required by statute, have been complied with: *Mansfield etc. R. R. Co. v. Drinker*, 30 Mich. 124; *Tuttle v. Michigan Air Line R. R. Co.*, 35 Id. 247. But in some of the states, particularly in Illinois, great liberality is exercised in regard to contracts for consolidation between different railroad companies: *Dringsel v. Ohio and Miss. R'y Co.*, 8 Rep. 641. As to effect of consolidation on previous vote, see *Harshman v. Bates Co.*, 3 Dill. 150.

4. **ASSENT OF STOCKHOLDERS.**—The general rule is, that the consent of every stockholder is necessary for consolidation, and those who dissent cannot be compelled to assent: *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 543; *Gardner v. Hamilton Ins. Co.*, 33 N. Y. 421; *Mowrey v. Indianapolis etc. R. R. Co.*, 4 Biss. 78; *Blatchford v. Ross*, 5 Abb. Pr., N. S., 441; S. C., 54 Barb. 42; *Chapman v. Mad River etc. R. R. Co.*, 6 Ohio St. 119; *In re Empire Assurance Corp.*, L. R. 4 Eq. 341; *Mowrey v. Indianapolis*, 4 Biss. 86; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 455. In conferring authority to consolidate corporations, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Such legislation would impair the obligation of contracts, and therefore be invalid. Consequently, there is no power to force a stockholder of the old corporation to join the new corporation, and to receive stock in it on the surrender of his stock in the old company: *Clearweather v. Meredith*, 1 Wall. 39, 41; *Gardner v. Hamilton*, 33 N. Y. 421. A dissenting stockholder in an old railroad corporation is entitled to an injunction to prevent its consolidation with another company: *Mowrey v. Indianapolis etc. R. R. Co.*, 4 Biss. 78. A consolidation without his consent relieves him from liability on his subscription, or entitles him to recover interest: *Illinois etc. R. R. Co. v. Cook*, 29 Ill. 237; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42; *Gardner v. Hamilton*, 33 N. Y. 421; *Midland G. W. R'y v. Leech*, 3 H. of L. 872; *Cork etc. R'y Co. v. Paterson*, 18 Com. B. 414. A consolidation, even when authorized by statute, but without the consent of the stockholders, discharges the stockholders not consenting from the payment of subscriptions: *McCray v. Junction R. R. Co.*, 9 Ind. 359; and the fact that the consolidated company bears the same name as the original company to which the subscription was made will not change this rule: *Shelbyville etc. Turnpike Co. v. Barnes*, 42 Id. 498. A subscription, however, to stock in the new corporation formed by the consolidation of two old ones may be deemed a consent to the consolidation: *Fisher v. Evansville etc. R. R. Co.*, 7 Id. 407; and if, at the time of subscribing, the subscriber knows that a consolidation may take place, as where authority to consolidate is given in the charter, or in the legislative act passed before the subscription, he will be bound: *Hanna v. Cincinnati etc. R. R. Co.*, 20 Id. 30; *Nugent v. Supervisors*, 19 Wall. 251; though the consolidation took place without his knowledge or consent: See case last cited, and numerous citations therein. The legislature may, by the exercise of the right of eminent domain, grant authority to corporations having duties to perform to the public, to consolidate without the consent of stockholders. Thus the legislature may, when public necessity requires it, grant authority to consolidate existing connected railroad routes, if they provide a just compensation for the shares of such stockholders as dissent: *Black v. Delaware etc.*, 24 N. J. Eq. 455. And where no provision is made for a just compensation for the shares of dissenting stockholders, they can enjoin the consolidation until such compensation is made: *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42; *Mowrey v. Indianapolis etc. R. R. Co.*, 4 Biss. 85.

5. **EFFECT OF CONSOLIDATION.**—1. *Effect on Previously Existing Companies.*—The effect of consolidation upon former companies, except so far as the com-

trary may be provided by the statute authorizing consolidation, is, as a general rule, to dissolve all the old corporations, and to create a new one assuming the liabilities, and succeeding to the rights of the old companies: See principal case; *Paine v. Lake Erie etc. R. R. Co.*, 31 Ind. 283; *Miller and Miss. R. R. Co. v. Lancaster*, 5 Coldw. 514; *Zimmer v. State*, 30 Ark. 677; *Robertson v. City of Rockford*, 21 Ill. 451; *State v. Maine Cent. R. R. Co.*, 66 Me. 500; *Shields v. Ohio*, 95 U. S. 325; *Railroad Co. v. Maine*, 96 Id. 499; *Railroad Co. v. Georgia*, 98 Id. 363. But in *Central R. R. etc. v. Georgia*, 92 Id. 665, it was held that the consolidation of two railroad companies did not necessarily work a dissolution of both and the creation of a new corporation; and that whether such would be its effect depended upon the legislative intent manifested in the statute under which the consolidation took place. But the new company, unless restricted by the law under which the consolidation takes place, succeeds to all the rights and liabilities of the former companies: *Zimmer v. State*, 30 Ark. 677; *Thompson v. Abbott*, 61 Mo. 176; *Chicago etc. R. R. Co. v. Moffitt*, 75 Ill. 524. The new company is liable for the wrongful acts of the companies consolidated: See case last cited. The effect of a charter provision authorizing consolidation is to constitute a contract between the state and the corporation which cannot be impaired by subsequent legislation: *Zimmer v. State*, 30 Ark. 677. An act which provided that the new corporation was to "have the powers, privileges, and immunities possessed by each of the corporations" united in it, and which had somewhat different powers, etc., was construed so as to give the new corporation only the privileges, powers, and immunities, which the corporation with the fewest privileges, powers, and immunities possessed, and which were common to all: *State v. Maine Cent. R. R.*, 66 Me. 488. Where separate statutes are passed authorizing the erection of a boom, they must be interpreted separately though both become the property of one company; and an act consolidating the two boom companies will not change the liability of either under its act of incorporation to deliver logs at its own boom, the boom in which they were caught: *Gould v. Langdon*, 43 Pa. St. 365. The presumption is, where two companies are consolidated, that each of them will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed: *Tomkinson v. Branch*, 15 Wall. 460. For other cases on this point, see *New Jersey etc. R'y Co. v. Strait*, 35 N. J. L. 322; *Fisher v. New York etc. R. R. Co.*, 46 N. Y. 644; *In re Rome, W., & O. R'y Co. v. Ontario etc. R. R. Co.*, 16 Hun, 445; *Railroad Co. v. Maine*, 96 U. S. 499; *Phila. etc. R. R. Co. v. Maryland*, 10 How. 376. Where a general law reserved to the legislature the right to alter or repeal all corporate charters, and a new corporation was formed by the consolidation of two companies which were chartered before the passage of this law, but which were not consolidated until afterwards, it was held that the two corporations came into existence subject to such general law: *Shields v. Ohio*, 95 U. S. 319.

2. *Effect upon Property of Previously Existing Companies.*—Where one corporation goes entirely out of existence by being consolidated or merged into another, and no arrangements are made respecting the property and liabilities of the extinguished corporation, the newly created one will be entitled to all the property: *Thompson v. Abbott*, 61 Mo. 176. Thus the new corporation may lawfully use a patented axle-box which both the old corporations had been licensed to use: *Lightner v. Boston etc. R. R. Co.*, 1 Low. 338. So the right to railroad-aid subscriptions from towns and counties passes, with other rights and privileges, into the new conditions of existence which are assumed by virtue of a consolidation of railroad companies: *County of Scotland*

v. *Thomas*, 94 U. S. 682; *State v. Green Co.*, 54 Mo. 540; *Nugent v. Supervisors*, 19 Wall. 241; S. C., 3 Biss. 105. A new corporation, however, cannot be considered a purchaser in good faith for value, where it takes the property of the old company subject to existing liens, but where no money was paid by either party: *The Key City*, 14 Wall. 653. So where the indebtedness of an old company has not ripened into a lien, the effect of consolidation with another is to release the former of all indebtedness where the latter becomes the proprietor of the property and franchises of the former: *Bruffett v. Great W. R. R. Co.*, 25 Ill. 353. By the old common law, the dissolution of a corporation extinguished its debts; but courts of equity will, in such cases, consider the property and effects as a trust fund for the payment of creditors and for the shareholders, no matter into whose hands they may go: *Powell v. North Mo. R. R. Co.*, 42 Mo. 63.

3. *Effect as to Liabilities of New Company.*—Where two or more companies have consolidated, the new one may enforce the rights of the old ones: *University of Vt. etc. v. Baxter's Estate*, 42 Vt. 99; but it is also subject to their liabilities: *Prouty v. Lake Shore etc. R'y Co.*, 52 N. Y. 363; *Montgomery and W. P. R. R. Co. v. Boring*, 51 Ga. 582; *Eaton and Hamilton R. R. Co. v. Hunt*, 20 Ind. 457; *Indianapolis etc. R. R. Co. v. Jones*, 29 Id. 465. The fact of consolidation of itself implies, as between the companies, an acceptance by the new company of the rights and liabilities of the old ones to the extent directed by the act authorizing the consolidation: *Miller and Miss. R. R. Co. v. Lancaster*, 5 Coldw. 514. Where a railroad company, after the execution of promissory notes, is consolidated with another company, and the newly formed company assumes a new name, it may be sued by the name thus assumed, and it will be estopped from denying the name by which it is sued: *Columbus etc. Cent. R'y Co. v. Skidmore*, 69 Ill. 566. So where the articles of consolidation of two railway companies provided that the new company should assume the debts and liabilities of the old companies, and should assume and carry out all their unexecuted contracts, and the act of the legislature, ratifying and confirming the consolidation, saved the rights and remedies of creditors, it was held that a person performing labor under a contract with one of the old companies might maintain an action against the new company to recover whatever sum was due him upon his contract: *Western U. R. R. Co. v. Smith*, 75 Ill. 496; and see *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 307. Where two railroad corporations have been consolidated, an action for damages also lies against one of the old companies for personal injuries causing death, and which resulted from the wrongful act of one of the old companies: *Warren v. Mobile etc. R. R. Co.*, 49 Ala. 582. In this connection, see *Miller v. National Steamship Co.*, 67 Barb. 285. Acts authorizing consolidation generally provide, however, for the continuance of the separate existence of the old companies, so far as outstanding obligations to third persons are concerned: Boone on Corporations, sec. 191, and cases and statutes there cited. Such provisions include obligations arising out of torts: See *Warren v. Mobile etc. R. R. Co.*, *supra*; *Selma, Rome, etc. R. R. Co. v. Harbin*, 40 Ga. 706. Consolidation does not extinguish the liability of old companies upon suits which were commenced prior to their amalgamation: *Baltimore etc. R. R. Co. v. Muselman*, 2 Grant, 348; *Prouty v. Lake Shore etc. R'y Co.*, 52 N. Y. 363; *Shackleford v. Mississippi Cent. R. R. Co.*, 52 Miss. 159. But choses in action transferred to the newly created company may be enforced by it in its own name: *Cumberland College v. Ish*, 22 Cal. 641; *Miller and Mississippi R. R. Co. v. Lancaster*, 5 Coldw. 514; *University of Vermont v. Baxter's Estate*, 42 Vt. 99. The new company, however, is liable for the debts of each of the original

companies: *Columbus etc. Cent. R'y Co. v. Powell*, 40 Ind. 37. On the other hand, it may compromise and settle claims against the old companies, and sustain an action to enforce the settlement: *Paine v. Lake Erie etc. R. R. Co.*, 31 Id. 283. Where two or more railroad corporations are consolidated, and the new corporation thus formed assumes the debts and obligations of the original companies, the official representatives individually of the new organization are not necessary or proper parties to enforce a liability of one of the old companies. If the plaintiff has a cause of action, it is against the new corporation alone, and not against its individual directors and officers: *Chase Vanderbilt*, 62 N. Y. 307.

6. INTERSTATE CONSOLIDATIONS.—There is no legal difficulty in the way of the creation of a single corporation by the concurrent action of two or more states; nor of the consolidation by one state of two or more corporations, where one of them is a foreign one: *Bishop v. Brainerd*, 28 Conn. 289. So in *Railroad Co. v. Harris*, 12 Wall. 82, the court said: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one." See *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 457; *Ohio and Miss. R. R. Co. v. Wheeler*, 1 Blackf. 286; *Railway Co. v. Whitton*, 13 Wall. 270. But the consolidation of the stock of two railroad companies of different states does not constitute the corporations thus consolidating one corporation of both states, or of either; but the corporation of each state continues a corporation of the state of its creation, although the same persons as officers and directors manage and control both corporations as one body. Such a consolidation does not convert the respective corporations into one company in the same way and to the same degree that might follow a consolidation of two companies within the same state. So where two states have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must nevertheless be considered as a distinct corporation in each state: *Racine and Miss. R. R. Co. v. Farmers' Loan etc. Co.*, 49 Ill. 331, 348; *Ohio and Miss. R. R. Co. v. Wheeler*, 1 Blackf. 297; *Farnum v. Blackstone Canal Corp.*, 1 Sumn. 46; *Delaware R. R. Tax Case*, 18 Wall. 206. The status of a consolidated company formed by the amalgamation of two companies of different states is said in Illinois to be "an association incorporated in and by each of the states; and when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits." *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 619, per Breese, J.; *Attorney-General v. Boston and Me. R. R.*, 109 Mass. 99; *State, Eastern Delaware etc. Bridge Co. v. Metz*, 32 N. J. L. 199. A corporation created by concurrent legislation of two states, receiving from each the same charter in legal effect, has a legal domicile in each state, and may lawfully hold its meetings and transact incorporate business in either state: *Bridge Co. v. Meyer*, 31 Ohio St. 317. Swayne, J., in *Railroad Co. v. Harris*, 12 Wall. 82, says that "the jurisdictional effect of the existence of a consolidated corporation, as regards the federal courts, is the same as that of a co-partnership of individual citizens residing in different states." As to validity of amendments to charter of corporations acting under authority of two states, and as to rights where the charter is enacted in one state and confirmed in another, see *City of Covington v. Covington etc. Bridge Co.*, 10 Bush, 69. "A corporation," says Bedle, J., in *McGregor v. Erie R'y Co.*, 35 N. J. L. 118, "may have a twofold organization, and be, so far as its relations to state is concerned, both foreign and domestic. It may have a corporate entity in

each state, yet in its general character be of a bifold organization:" See authorities therein cited. The subject of this note is discussed in *Boone on Corporations*, secs. 185-192, which work has been freely used in the treatment of the questions involved.

GREEN v. GREEN.

[16 INDIANA, 252.]

MERE FACT THAT MATERIALS ARE FURNISHED OR WORK DONE DOES NOT ALONE CONSTITUTE LIEN, where the statute provides that a lien may be acquired by filing a notice in the recorder's office.

MECHANIC'S LIEN FOR WORK DONE OR MATERIALS FURNISHED IN CONSTRUCTION OF HOUSE DOES NOT "ATTACH" until notice of the intention to hold the lien is filed in the recorder's office of the proper county, where the statute provides that such lien may be "acquired" by filing such notice. The notice, however, must be filed within sixty days from the time the building is completed.

"ACQUIRED" MEANS "ATTACHES" in mechanic's lien law of Indiana: See 2 R. S. 1852, sec. 650, p. 182.

SUIT on note, and to foreclose a mortgage. The facts are stated in the opinion.

R. Parrett, for the appellant.

By Court, *HANNA, J.* Suit on a note, and to foreclose a mortgage. One *Monger* was admitted to defend. He set up that in September, 1859, he had a lien on the premises held by this mortgage for materials furnished and work done on a house; and that on November 2d he filed the same in the recorder's office, and procured a judgment, upon which said lands were sold, and he became the purchaser thereof. The mortgage was admitted to have been executed and recorded in October of the same year.

On the trial, the record and deed in the case of *Monger v. Green* was given in evidence. There was also evidence that the house built by said *Monger* was on the same land mortgaged, and that it was completed about September 4, 1859. There was no evidence as to the amount due *Monger* for which he claimed a lien, nor of his notice of lien and the recording thereof, other than as contained in said record of said suit. The plaintiff in the mortgage suit is not shown to have been a party to, or to have had notice of, that suit.

The finding was against the plaintiff. Was the evidence sufficient? The solution of this inquiry depends upon the construction to be given to the statute upon the subject of mechanics' liens.

The first section of that statute declares that for materials furnished and work done, in certain instances, there may be a lien. The force that should be given to these words, "may be," depends somewhat upon the context. By looking into other portions of the same statute, we find that it is provided that a lien may be acquired by filing a notice in the recorder's office. It would appear, then, that the mere fact that materials are furnished or work done does not alone constitute a lien; but that the party must, by the notice so filed, declare his intention of holding a lien on the building, etc., so constructed. The party may give this notice at any time when he is prepared so to do, not outside of sixty days after he has completed the building. The lien is then "acquired:" 2 R. S. 182; which we construe to mean, attaches from that time. Under this view, the evidence was insufficient. The mortgage lien was the oldest.

The judgment is reversed, with costs. Cause remanded, etc.

MECHANICS, TO PRESERVE THEIR LIEN FOR WORK PERFORMED, MUST FILE THEIR CLAIM within six months from the completion of the building: *Ramsey's Appeal*, 27 Am. Dec. 301.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The lien of a mechanic only takes effect from the time of filing his notice in the recorder's office: *Millikin v. Armstrong*, 17 Ind. 458; *Waldo v. Walters*, Id. 535. Furnishing the materials or doing the work does not constitute the lien. That is done by filing notice of an intention to hold such lien: *Sharpe v. Clifford*, 44 Id. 348. The lien of a mechanic is statutory, and to create and enforce it, the statute must be complied with; and as against third persons, no material alterations can be allowed in the notice, on filing a complaint upon it: *Wade v. Reitz*, 18 Id. 308. While street-improvement work may have been completed under a contract therefor, yet, under a statute providing for making estimates from time to time, and that such estimates shall be a lien, etc., a lien for improvements does not attach to the property adjoining such improved street until the estimate is made, as it is the estimate which constitutes the lien. Consequently, where a contract was let in June, and the owner of a lot on an improved street sold in September, and the estimate was not made until October, the purchaser who has been compelled to pay an assessment to save the property from sale cannot recoup the amount assessed against the property from the purchase-money, a portion of which remained unpaid. The principal case was cited as analogous to this one in principle: *Langedale v. Nicklaus*, 38 Id. 291. The cases recognizing the constitutionality of the mechanic's lien law of Indiana will be found cited and referred to in *Hall v. Bunte*, 20 Id. 305; and among them the principal case is cited.

HEASTON v. CINCINNATI AND FORT WAYNE R. R. Co.

[16 INDIANA, 275.]

COURT CANNOT ALTER RECORD OF ITS PROCEEDINGS, BUT MAY CORRECT ERRORS so that such material issues may be formed as will settle the pending controversy.

COURTS JUDICIALLY KNOW WHEN RAILROAD LAW WENT INTO EFFECT.

CORPORATION MAY SUE IN ITS CORPORATE NAME, IN INDIANA, without averring how it became a corporation, or that it is such; and a default or answer in denial of the cause of action admits the capacity of the plaintiff to sue.

ANSWER OF NUL TIEL CORPORATION MAY BE MADE AT COMMENCEMENT OF SUIT, but it is only an answer in abatement, and must precede an answer to the merits.

ANSWER OF NUL TIEL CORPORATION PUTS IN ISSUE the existence, *de facto*, of a corporation under an authority sanctioning such a corporation *de jure*, and proof is limited to this fact.

UNDER ANSWER OF NUL TIEL CORPORATION, MERE IRREGULARITIES IN ORGANIZATION cannot be shown, where there is no defect of power.

ANSWER DENYING EXISTENCE OF CORPORATION PLAINTIFF, which is shown to have once existed, should particularly set forth the manner in which the corporate powers ceased.

PARTY TO CONTRACT WITH CORPORATION DE FACTO IS ESTOPPED, in a suit upon such contract, to deny its *de facto* organization at the date of the contract.

PARTY TO CONTRACT WITH PRETENDED CORPORATION, organized without law, or under an unconstitutional one, is not estopped to deny its existence at the date of the contract.

WHETHER PLAINTIFF IS CORPORATION OR PARTNERSHIP, where the plaintiff's name *prima facie* imports a corporation, is a question which may be raised by an answer alleging want of parties in interest in the suit.

TENDER OF STOCK TO SUBSCRIBER FOR CAPITAL STOCK OF COMPANY IS NOT NECESSARY to entitle the company to recover the amount subscribed.

SUSTAINING CHALLENGE TO JUROR FOR CAUSE not rendering him legally incompetent, where the act was done in an effort to get an impartial jury, and such result was achieved, is not error for which judgment will be reversed.

CALL FOR PAYMENT OF INSTALLMENT ON STOCK IN THIRTY DAYS FROM DATE, and every thirty days thereafter, is evidenced by a resolution of the board of directors requiring stockholders "to pay an installment of ten per cent every thirty days on all cash subscriptions, until the whole subscriptions are paid."

WORD "MONTH" AND WORDS "THIRTY DAYS" ARE SYNONYMOUS TERMS in the general railroad law of Indiana.

NOTICE OR PERSONAL DEMAND BEFORE SUIT IS NOT NECESSARY to enable a railroad company to recover installments due on stock subscribed for, under the Indiana railroad law.

SUBSCRIBERS MUST TAKE NOTICE OF ACTS OF DIRECTORS as to calls for payments upon stock subscribed for.

LEGAL NOTICE THAT INSTALLMENTS ON RAILROAD STOCK ARE DUE AND PAYABLE CONSISTS in the publication of the notice, fixing the time of payment, in a newspaper in each of the counties through which the railroad extends.

PARTY MAY DEMAND THAT INSTRUCTIONS BE REDUCED TO WRITING, and if the court then give them orally, it is error; but exception must be taken or the error is waived.

EXISTENCE OF CORPORATION MAY BE PROVED BY COPY OF ARTICLES OF ASSOCIATION, certified by the secretary of state, in a suit brought upon the preliminary articles for subscription of stock.

CORPORATION MAY SUE UPON ITS PRELIMINARY ARTICLES FOR SUBSCRIPTIONS for stock appearing thereon; but it was not contemplated by the railroad law that such suits should be brought on the articles of association.

ARTICLES OF SUBSCRIPTION AND ASSOCIATION MAY BE COMBINED, and where the latter contain an express or implied promise to pay the sums annexed to the names of the subscribers, suits may be maintained on them.

THE opinion states the facts.

J. Smith and M. Way, for the appellant.

O. P. Morton and W. A. Peele, for the appellee.

By Court, PERKINS, J. The Cincinnati and Fort Wayne Railroad Company sued David Heaston on an alleged subscription to the capital stock of said company of one thousand five hundred dollars. His subscription appears to the original articles of organization, and a copy of them is filed as the foundation of the action. The defendant answered in sixteen paragraphs. To a part of those paragraphs the plaintiff demurred; the court sustained the demurrer, the defendant excepted, and the cause was continued. At a subsequent term, the court permitted those demurrers to be withdrawn, and others to be filed, argued, and decided upon. The appellant contends that when "a bill of exceptions is sealed, the truth of the facts contained in it cannot afterward be disputed: 2 Tidd's Pr. 864. Both parties are concluded by it, and the adverse party cannot afterward aver the contrary, or even supply an omission in it: 1 Archb. Pr. 210. Hence he cannot have it changed. Our statute allows such an exception as this to be placed on the record; it, however, stands there as if it were in a bill of exceptions. The bill is no part of the record in the court below: 2 Tidd's Pr. 865; and of course it could not be altered by the court below on the ground of its right to amend its record."

It is true that the court cannot legally alter the record of its proceedings after the term, and that a bill of exceptions cannot be altered: See *Boyd v. Blaisdell*, 15 Ind. 73. Nevertheless, it is undoubtedly proper that before a cause is tried, material issues calculated to settle the merits of the pending controversy should be formed, and courts should possess power, up to that point, of correcting errors that may have oc-

curred in their proceedings. Hence the power of permitting amendments, of filing additional pleadings, etc. The successive acts may all properly appear of record, but the later may correct the errors in the earlier. In this case, if instead of permitting the former demurrers to be withdrawn, and new ones filed, the court had permitted the paragraphs of the answer to be refiled, and new demurrers to them, covering the ground of the former and curing defects, it could not have been held erroneous. It does not appear that the mode of reaching the result arrived at below injured the defendant; and if not, the cause should not be reversed on his application on account of an error that worked no injury to the merits of the defense.

The court, on motion, struck out six paragraphs of the answer. Those paragraphs denied the existence of the corporation, assigning, in the different paragraphs, reasons why the plaintiff was not such; as, that the articles of organization were filed before the law was in force, etc. The paragraphs would have been bad on demurrer; a right result was reached. The court judicially knew that the general railroad law was in force at the time the corporation was formed: *State v. Bailey*, 16 Id. 46 [*ante*, p. 405].

A corporation may sue, in this state, in its corporate name, and need not aver in the complaint how it became a corporation, nor that it is such. And a default or answer in denial of the cause of action admits the capacity of the plaintiff to sue: *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267 [29 Am. Dec. 372], and cases cited; *Hubbard v. Chappel*, 14 Ind. 601.

But there may be an answer of *nul tiel* corporation, at the commencement of the suit: The cases *supra*; and *Morgan v. Lawrenceburg Ins. Co.*, 3 Id. 285; Ind. Dig. 318. Such answer, it is now settled in this state, is an answer in abatement, and must therefore precede answers to the merits: *Jones v. Cincinnati Type F. Co.*, 14 Ind. 89; *McIntire v. Preston*, 5 Gilm. 48 [47 Am. Dec. 321]; *Phenix Bank v. Curtis*, 14 Conn. 437 [36 Am. Dec. 492]. And upon the trial of an issue of fact on such answer, or on a reply thereto, the proof is limited to the question of the existence *de facto* of a corporation, under an authority sanctioning such a corporation *de jure*. In other words, mere irregularities in organization cannot be shown collaterally, where there is no defect of power: *Bank of Toledo v. International Bank*, 21 N. Y. 542; and the authorities *supra*. See the cases cited in Abb. Pl. 179; also *Ewing v. Robe-*

son, 15 Ind. 26. And where such answer denies the existence, at the commencement of the suit, of a corporation which is shown to have once existed, the answer should particularly set forth the manner in which the corporate powers ceased: Ind. Dig., sec. 63, p. 319. A faulty answer in this respect was erroneously held good in *Morgan v. Lawrenceburg Ins. Co.*, 3 Ind. 285.

We have asserted above that the issue of *nul tiel* corporation is upon the existence of a *de facto* corporation, where one *de jure* is authorized; and upon this fact rests the doctrine of estoppel to deny the existence of a corporation, in certain cases. The estoppel goes to the mere *de facto* organization, not to the question of legal authority to make an organization. A *de facto* corporation, that by regularity of organization might be one *de jure*, can sue and be sued. And a person who contracts with such corporation while it is acting under its *de facto* organization, who contracts with it as an organized corporation, is estopped in a suit on such contract to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply: *Harriman v. Southam*, 16 Ind. 190; *Brown v. Killian*, 11 Id. 449; see *Evansville I. & C. Co. v. Evansville*, 15 Id. 395. So if the plaintiff, suing in a name importing *prima facie* a corporation, in fact is not assuming to act as a corporation, but only as a partnership, this fact may be raised by an answer alleging want of parties in interest to the suit: *Farnsworth v. Drake*, 11 Id. 101; see *Brown v. Killian*, Id. 449. The sixteenth paragraph of the answer averred the non-performance of a condition precedent by the corporation, it having failed to tender to the defendant a certificate of stock. The paragraph was bad: *New Albany & S. Co. v. McCormick*, 10 Id. 499.

It is alleged that a challenge to a juror was wrongly sustained; but judgment will not be reversed, because the court sustained a challenge to a juror, for cause which did not render him legally incompetent, where the act was done in an effort to get a perfectly impartial jury, and such result was achieved: *Carpenter v. Dame*, 10 Ind. 125.

The board of directors of the company, on June 21, 1853, passed and entered on its records the following resolution:

"Resolved, that the stockholders in the Cincinnati and Fort
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Wayne Railroad Company are hereby required to pay an installment of ten per cent every thirty days on all cash subscriptions, until the whole subscriptions are paid; and that due notice thereof be given, signed by the president and secretary." It was offered in evidence, on the trial, and objected to by the appellant for the following reasons, stated at the time: 1. That it was too vague, indefinite, and uncertain to bind the defendant; 2. That it did not fix a time when payment of the installments of stock should commence, nor did it fix a definite time when any installment should be paid; 3. That it required the installments of stock to be paid in installments of ten per cent every thirty days.

The court overruled the objections and let the resolution be read to the jury. We think the resolution was admissible to show a call for payment of an installment in thirty days from date, and every thirty days afterward. The appellee claims to be incorporated under the general railroad law of May 11, 1852, the eighth section of which, 1 R. S. 412, provides that the directors may call in and demand from the stockholders any sums of money by them subscribed, in such payments or installments as the directors shall deem proper; under penalty of forfeiture of the stock subscribed, if payment be not made by the stockholder "within thirty days after personal demand, or notice requiring such payment, shall have been made in each county through which such road shall be laid out, in which a newspaper shall be published, provided that subscriptions shall not be required to be paid, except in equal installments of not more than ten per cent a month."

It is contended that the word "month" here must be taken to mean calendar month, under the rule prescribed by the code, 2 R. S. 339 (Ind. Dig. 748), which is that the word "month" shall mean calendar month, unless otherwise expressed. We think it is sufficiently expressed otherwise in the above-cited section of the railroad law; the word "month" in the proviso is used to express the same time as the words "thirty days" in the body of the section.

Where the charter requires notice as a condition precedent to suits for installments of stock, and there is no waiver of the condition, notice, as required by the charter, must be given: Ind. Dig., secs. 73, 74, 75, p. 321. The general railroad law, above quoted, does require notice, or a personal demand, thirty days before a proceeding to forfeit the stock, but not before suit to recover installments: *Smith v. Indiana etc. Co.*, 12 Ind.

61; *Johnson v. Crawfordsville F. etc. Co.*, 11 Id. 280. The subscribers must take notice of the acts of the directors as to calls.

To constitute legal notice under the charter, one and the same notice, fixing the same time for payment, must have been published in a newspaper in each of the counties in which one was published, through which the line of the road extended.

The defendant, at the proper time, required the instructions below to be reduced to writing, but the court gave some orally. This was error; but no exception was taken, and the error was waived by that omission.

An application was made for a continuance, and it was refused. It appears that Heaston, the defendant below, did not, by his own hand, fill out the subscription to the articles of association. It does not very clearly appear whether he signed preliminary articles. He desired to prove by an absent witness that he did not authorize the person who did fill up his subscription to make it a cash subscription, etc. The affidavit filed for a continuance appears to have been held insufficient, because it was not sufficiently definite as to which set of articles the testimony of the absent witness was to be directed to: See *Tonica & P. R. R. Co. v. Stein*, 21 Ill. 96; *Junction R. R. Co. v. Reeve*, 15 Ind. 236. This suit, as has been before stated, was based exclusively on the articles of association, or, as they may be denominated, of organization; and if it could be maintained on those articles, of course the evidence in the cause should have been limited accordingly, and we think the affidavit specified them. It was not contemplated by the general railroad law that suits against subscribers of stock should be brought on the articles of association. They were not intended as articles of subscription. The first section of the railroad law provides for articles of subscription of stock in a contemplated railroad. When stock to the amount of fifty thousand dollars is thus subscribed, or if the length of the contemplated road be less than fifty miles, then stock to the amount of one thousand dollars per mile is subscribed; the persons having subscribed to these preliminary articles meet and elect directors, and prepare articles of association, which must contain: 1. The name of the corporation; 2. The amount of the capital stock which may be taken; 3. The number of shares of which it shall consist; 4. The number and the names of the first set of directors; 5. The name of the place from which, and the place to which, the road is to be constructed; the names of the

counties into which it will extend, and its length, as near as may be. These are all the facts the articles are to contain, and it is manifest that among them is no contract of subscription.

The articles containing the above statements are to be signed by subscribers of stock to the preliminary articles, to the number at least of fifteen, and who have taken at least, in the aggregate, the amount required for organization, and then to be filed with the secretary of state; whereupon the corporation exists. The articles are signed thus, and the amount that the signers have severally subscribed to the preliminary articles set opposite their names, in order that the secretary may see that a case exists in which he may receive and file the articles, and give existence to a corporate body; and that courts may see, from copies of the articles, that a legal corporation has been created.

The corporation thus created may sue for the stock upon the preliminary articles, they constituting the cause of action, and give in evidence copies, certified by the secretary of state, of the articles of association, to prove their corporate existence. These preliminary articles inure to the benefit of the corporation formed: *Tonica & P. R. R. Co. v. McNeely*, 21 Ill. 71; *Penobscot Railroad Company v. Dummer*, 40 Me. 172 [63 Am. Dec. 654]; Angell & Ames on Corporations, 190, 191, 412, 414; Redfield on Railways, 96, 631, et seq.; see the New York cases cited in Abb. Pl. 179. And if additional stock be desired, it is not subscribed to the articles of association, but to separate articles of subscription (1 R. S., sec. 3, p. 410), which may be sued upon by the corporation.

A word here upon the fifth specification required in the articles of association, viz., that of the route and termini of the road. The termini designated in the articles set forth in this suit are, that said "road shall commence at Fort Wayne, in the county of Allen, and shall be constructed to the eastern line of the county of Wayne, pointing in the direction of Cincinnati." We have seen no case sustaining so vague a terminus as the southern one of this road, and as definite a one was held void, in *Atlantic & O. R. R. Co. v. Sullivan*, 5 Ohio St. 276. We will not now express an opinion on the point. There may be further authorities upon it. But notwithstanding the articles of association were not intended to be articles of subscription of stock, yet this court has held, in *Eakright v. Logansport etc. R. R. Co.*, 13 Ind. 404, that the articles of sub-

scription and association may be combined; and that where they are so, where the articles of association contain an express or implied promise to pay the sums annexed to the names of the subscribers, who must individually, or by agent, subscribe the articles, suits may be maintained upon them.

Considering the amount recovered in this case, the circumstances attending the trial, the evidence given, and that which was absent, and all the surroundings, we think the court should have sustained the motion that was made for a new trial.

The judgment is reversed, with costs. Cause remanded, with leave to amend, etc.

POWER OF COURTS TO AMEND RECORDS: *Hill v. Hoover*, 68 Am. Dec. 70, and note 72; *Hollister v. Judges of District Court*, 70 Id. 100, and note 102; *Houston v. Williams*, 73 Id. 565.

THAT PLAINTIFF IS CORPORATION NEED NOT BE ALLEGED, when it sues in its corporate name: *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 372, and extended note thereto 375, on allegation of corporate existence; note to *California Steam Nav. Co. v. Wright*, 65 Id. 514; *Richardson v. St. Joseph Iron Co.*, 33 Id. 400; nor need it aver how it was incorporated; *Bank of Utica v. Smalley*, 14 Id. 526; nor need it set forth its charter, or the names of the individuals composing the company: *Selma etc. R. R. Co. v. Tipton*, 39 Id. 344. But a domestic corporation must, like a foreign corporation, aver and prove the fact of incorporation: *Holloway v. Memphis etc. R. R. Co.*, 76 Id. 68, and note 71, on allegation of corporate existence; *Savage Mfg. Co. v. Armstrong*, 35 Id. 227.

CORPORATE EXISTENCE, HOW QUESTIONED: *Savage Mfg. Co. v. Armstrong*, 35 Am. Dec. 227, and note 229; *Boston Glass Manufactory v. Langdon*, 35 Id. 292; *Penobscot Boom Corp. v. Lamson*, 33 Id. 656, and note 663. The cases show that such existence is questioned by plea in abatement, and not by pleading specially to the merits: See also, on same point, notes to *Brookville etc. Turnpike Co. v. McCarty*, 65 Id. 771.

PROPER ORGANIZATION OF CORPORATION MAY BE PROVED BY ITS RECORDS, ETC.: See note to *Wight v. Shelby R. R. Co.*, 63 Am. Dec. 526; *Penobscot R. R. Co. v. Dummer*, Id. 654. As to necessity of compliance with statute authorizing its organization, and the effect of filing certified copy of articles of incorporation with secretary of state, see *Mohelunne Hill Mfg. Co. v. Woodbury*, 73 Id. 658.

PLEADING WHICH AVERS CESSATION OF CORPORATE POWERS must show how they came to a termination: *Brookville etc. Turnpike Co. v. McCarty*, 65 Am. Dec. 768; *Harris v. Muskingum Mfg. Co.*, 29 Id. 372.

PARTY CONTRACTING WITH CORPORATION IS ESTOPPED FROM DENYING ITS EXISTENCE, WHEN: *Society etc. v. Morris C. & B. Co.*, 21 Am. Dec. 41; *Selma etc. R. R. Co. v. Tipton*, 39 Id. 344, and note 358; *Cahill v. Kalamazoo Mut. Ins. Co.*, 43 Id. 457, and note 465; *Jones v. Bank of Tennessee*, 46 Id. 540; *N. H. Cent. R. R. v. Johnson*, 64 Id. 300; *Yard v. Pacific Mut. Ins. Co.*, Id. 467; *Brookville etc. Turnpike Co. v. McCarty*, 65 Id. 768, and note 771; and when not: *Holloway v. Memphis etc. R. R. Co.*, 76 Id. 68, and note 71.

NO TENDER OF CERTIFICATE OF STOCK IS NECESSARY BEFORE SUIT BROUGHT UPON SUBSCRIPTION: *New Albany etc. R. R. Co. v. McCormick*, 71 Am. Dec. 337.

NECESSITY OF DEMAND FOR PAYMENT OF SUBSCRIBED STOCK BEFORE ACTION THEREFOR: See *Penobscot R. R. Co. v. Dummer*, 63 Am. Dec. 654; *Robinson v. Pittsburgh etc. R. R. Co.*, 72 Id. 792.

INSUFFICIENCY OF ORGANIZATION AS DEFENSE AGAINST STOCK SUBSCRIPTION: See note to *Russell v. Ballard*, 63 Am. Dec. 526.

PROVISIONS OF CORPORATE CHARTER ARE PRESUMED KNOWN TO SUBSCRIBERS to the stock of the corporation: See note to *Martin v. Pensacola etc. R. R. Co.*, 73 Am. Dec. 723; *Wight v. Shelby R. R. Co.*, 63 Id. 522.

OBJECTION THAT INSTRUCTIONS WERE NOT REDUCED TO WRITING COMES TOO LATE, WHEN: *Taber v. Hutson*, 61 Am. Dec. 96.

SUBSCRIPTIONS FOR STOCK, WHEN BINDING, AND ACTIONS UPON: See note to *Wight v. Shelby R. R. Co.*, 63 Am. Dec. 526; note to *Machias Hotel Co. v. Coyle*, 58 Id. 714; note to *Strasburg R. R. Co. v. Echternacht*, 60 Id. 50; note to *Hartford etc. R. R. Co. v. Cronwell*, 40 Id. 358.

DISTINCTION BETWEEN SIMPLE PARTNERSHIP AND INCORPORATED ASSOCIATION POINTED OUT: See *Martin v. Pensacola etc. R. R. Co.*, 73 Am. Dec. 713, and note 722.

THE PRINCIPAL CASE WAS CITED IN each of the following cases and to the point stated: One who has, in connection with others, subscribed stock upon articles preliminary to the organization of a corporation, cannot afterward, without the consent of the other subscribers, withdraw his subscription: *Johnson v. Wabash Plank Road Co.*, 16 Ind. 390. No other judge than the one who tried the cause can correct a bill of exceptions: *Halstead v. Brown*, 17 Id. 203; nor does the judge who presided at the trial have any power to sign a bill of exceptions after he has ceased to be a judge: *Ketcham v. Hill*, 42 Id. 68. The only point decided in the principal case bearing upon these questions is, "that the court cannot legally alter the record of its proceedings after the term, and that a bill of exceptions cannot be altered." Id. 68. One who contracts with an organized corporation is estopped, in a suit upon such contract, to deny the existence of the corporation at the time he contracted with it as such: *Brownlee v. Ohio etc. R. R. Co.*, 18 Id. 70; *Williams v. Franklin Tp. A. Association*, 26 Id. 315; *Snyder v. Studebaker*, 19 Id. 464, discussing the estoppel as arising upon a matter of fact only. But where the plaintiff assumes to be a corporation organized in this state, the name must be such as to imply such a corporation as some law of the state authorizes: See case last cited. Where a corporation has once had a legal existence, a pleading that the corporation has ceased to continue its organized corporate existence must show and set forth particularly the manner in which the corporate powers ceased: *Sutherland v. Lagro etc. P. R. Co.*, 19 Id. 194. Where articles of association of a railroad company are defective in not specifying with sufficient certainty the terminus of the road, and they are properly filed with the secretary of state, such filing is notice to the state of such defect, and if the state neglects for eight years to take advantage thereof by *quo warranto*, or otherwise, the right to do so thereafter must be considered lost: *State v. Bailey*, Id. 453. A request for written instructions should show that it was handed to the court soon enough before the close of the argument to allow the court to prepare them: *City of Aurora v. Cobb*, 21 Id. 512. In a suit by a corporation, it is not necessary that the existence of the corporation be averred, either generally or by specially alleging facts necessary to show its

organization pursuant to law: *Olcro etc. Co. v. Orathead*, 28 Id. 275; *State v. Stout*, 61 Id. 146. When jury disagree, and are brought into court for further instructions, it is improper to give them any verbal explanations of the written instructions they first went out with: *Ohio and Miss. R'y Co. v. Rowland*, 51 Id. 286. A paragraph in abatement should be sworn to: *Indianapolis F. & Mfg. Co. v. Herkimer*, 46 Id. 144. Preliminary subscriptions seem to inure to the benefit of the corporation when formed: Id. 145; *Miller v. Wild Cat G. R. Co.*, 52 Id. 56. The principles of the principal case govern: *Vauster v. Franklin College*, 53 Id. 92. Where a motion to challenge a juror for incompetency is sustained, it will not be sufficient to reverse the judgment, though the juror was competent, unless appellants can show that they were injured on account of the challenge being sustained: *Coryell v. Stone*, 62 Id. 309. Corporate existence and capacity to sue are questions not raised by a demurrer for the want of facts. Such a demurrer admits the organization, and the capacity to sue: *Wiles v. Trustees of P. Church*, 63 Id. 207. So a general denial admits the character in which plaintiff sues. The question of a plaintiff's corporate capacity must be raised by an answer of *nil tiel* corporation: *Beatty v. Bartholomew Co. Agr. Soc.*, 76 Id. 93. Subscriber for stock of railroad corporation cannot defeat a recovery of his subscription on the ground that no certificate of stock has been tendered to him. It is unnecessary: *Slipser v. Earhart*, 83 Id. 179; *Miller v. Wild Cat G. R. Co.*, 52 Id. 58. Stockholders are bound to notice, without either publication or demand, when their subscriptions become due: *Beckner v. Riverside etc. Turnpike Co.*, 65 Id. 470. And corporations may call in subscriptions without notice or demand, except where the forfeiture of the stock is sought to be enforced: *Hill v. Nisbet*, 100 Id. 356.

DAWSON v. STATE.

[16 INDIANA, 428.]

EVIDENCE OF VOLUNTARY DRUNKENNESS NOT ADMISSIBLE IN LARCENY.—In a prosecution for larceny, evidence that the accused was in a state of voluntary intoxication just before and at the time of the commission of the alleged crime, is not admissible for the defense.

SMALL INTOXICATION MAY BE GIVEN IN EVIDENCE TO REBUT MALICE, where that is an ingredient of the charge, and this in cases either civil or criminal; but this principle does not extend to the ingredient of intention.

INDICTMENT for larceny. The facts are stated in the opinion.

James Gavin and Oscar B. Hord, for the appellant.

By Court, PERKINS, J. Indictment against Dawson for larceny. Conviction and sentence to the state prison. The defendant asked a continuance to obtain the evidence of a witness "that on the night the horse was taken, and immediately before the act, which is the alleged larceny charged in the indictment, the defendant drank at a grocery a large quantity of intoxicating liquor; and that he was in such a

state of drunkenness, and so besotted by liquor, as to be irrational."

The continuance was refused. It was wrongly refused, if the fact proposed to be proved could have operated to acquit the defendant; otherwise not. It presents a simple case of voluntary drunkenness just before and at the time of the commission of the alleged crime. We have found no precedent for the admission of such evidence on the part of the defense in a prosecution for larceny. The cases on this point are collected more completely in 1 Whart. Crim. L., 5th ed., sec. 41, than anywhere else: See also *O'Herrin v. State*, 14 Ind. 420. The reference in that case to Blackstone should be to the fourth instead of the third book. In cases, both civil and criminal, where malice is an ingredient of the charge, it seems that simple intoxication may be given in evidence to rebut it, but this principle does not seem to be extended to the ingredient of intention: Ind. Dig. 39.

The judgment is affirmed, with costs.

VOLUNTARY AND INTENTIONAL DRUNKENNESS IS NO EXCUSE FOR CRIME OR EXTENUATION OF IT: *Carter v. State*, 62 Am. Dec. 539.

CITATION OF PRINCIPAL CASE.—It is a general proposition of law that mental incapacity, produced by voluntary intoxication, existing only temporarily at the time of the commission of an offense, such as larceny, etc., is no excuse for the crime, nor a defense to a prosecution therefor. "But where the habit of intoxication, although voluntary, has been long continued, and has produced disease, which has perverted or destroyed the mental faculties of the accused, so that he was incapable, at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or distinguishing right from wrong when sober—in short, insane—he will not be held accountable for the act charged as a crime, committed while in such condition:" *Fisher v. State*, 64 Ind. 440.

STURGIS v. FAY.

[16 INDIANA, 429.]

STATE HAS JURISDICTION OVER ALL PERSONS AND ALL PRIVATE PROPERTY WITHIN HER BORDERS, and may subject both the one and the other to her judicial power; but she cannot thus subject either persons or property not within her jurisdiction.

STATE EXERCISES HER JURISDICTION OVER PROPERTY BY SEIZING IT through the officers of her courts.

STATE EXERCISES HER JURISDICTION OVER PERSONS BY BRINGING THEM BEFORE HER COURTS, by the action of her officers, or by notifying them to voluntarily appear. This notice she has absolute power to give to persons within her boundaries, but not to persons outside of her borders. Against the former class only has she power to render a personal judgment.

SERVICE WHICH AMOUNTS TO ACTUAL AND NOT CONSTRUCTIVE NOTICE.—

Where a copy of the summons regularly issued against a resident of the state is left by the serving officer at the place where such person then resided, the service is to be regarded as actual notice in law, and not constructive notice.

"USUAL OR LAST PLACE OF RESIDENCE" MEANS the residence into which the person, still a resident of the state, has moved, in the state, last before the service of process.

SERVICE CANNOT BE MADE ON NON-RESIDENT.

DEFENDANT'S ABSENCE IN ANOTHER STATE AT TIME OF SERVICE IS NO REASON FOR SETTING ASIDE RETURN OF SERVICE, though he was not actually notified of the suit until the first day of the term at which the summons was returnable: See *Conwell v. Atwood*, 2 Ind. 289.

AFFIDAVIT IS INSUFFICIENT TO AUTHORIZE VACATION OF JUDGMENT rendered upon actual notice in law, if it fails to show any meritorious defense, or any excuse for not making an application to set aside the judgment at the same term at which it was rendered. This applies to an application to set aside a judgment, rendered at a former term, on the ground, simply, that the defendant was absent from the state, when process was served and had no actual notice of the pendency of the suit until after judgment.

ACTION upon a promissory note. The facts are stated in the opinion.

W. H. Coombs, for the appellant.

J. A. Fay, for the appellee.

By Court, *PERKINS, J.* At the October term, 1859, of the Allen common pleas, Fay commenced an action against Sturgis upon a promissory note. The writ in the cause was served by leaving a copy at the residence of Sturgis. There was judgment against him by default.

At the succeeding January term, Sturgis filed an affidavit showing that he was absent from the state when process was served, and was ignorant of the pendency of the suit till after judgment, and moved that the judgment be set aside. The affidavit did not allege that affiant had any merits in his application, nor show any excuse for not moving to set aside the default at the same term of the court at which judgment was rendered.

The court overruled the motion to set aside.

The counsel for appellant contends that the judgment should have been set aside, because it was a nullity. He insists that it was a judgment rendered upon constructive service of notice, and that 2 R. S. 1852, sec. 395, p. 126, applies to it. That section reads: "No personal judgment shall be rendered against a defendant constructively summoned, who has not appeared in the action."

What, then, is constructive service? The state of Indiana has jurisdiction over all persons and private property within her borders. She may subject both the one and the other to her judicial power. But she cannot thus subject either persons or property not within her jurisdiction. It sometimes happens that the person is within her jurisdiction, while his property is not; and again, that the property is within her jurisdiction, while the person of the owner is not; and again, that both the person and the property of the person are within or without her jurisdiction.

The state exercises her jurisdiction over property by seizing it through the officers of her courts: See *Himely v. Rose*, 3 Cranch, 313; S. C., 2 Cond. R. 28. She exercises her jurisdiction over persons by bringing them before her courts, through the action of the officers of those courts, or by notifying them to voluntarily appear. This notice she has not the absolute power to give, except within her own boundaries; and in point of law, has no right to assume to give it beyond those limits as a ground of claiming the right of exercising jurisdiction. But to residents, or to persons actually within her jurisdictional limits, she has a right to give such notice by the officers of her courts; and those courts thus acquire a right to exercise jurisdiction over such persons by rendering personal judgment against them. Persons thus notified are not regarded in law as constructively, but as actually, summoned to appear. Such notice is given, in legal effect, when a copy of a summons, regularly issued by the proper clerk, in a suit instituted against a person who is a resident of this state, is left by the officer charged with the service of such summons, at the then place of residence of such person. The usual or last place of residence means the residence into which the person, still a resident of this state, has moved, in this state, last before the service of process. This requirement secures the service at the actual residence of the defendant in this state, at the time of service. If the defendant has become a non-resident, service cannot be made. As to other acts, also constituting in law such actual notice of suit, see 2 Code of Practice, by G. & H., sec. 35, p. 60, and notes. See also *Conwell v. Atwood*, 2 Ind. 289. In these cases, the defendant is presumed to have received the notice served. The judgment in this case, then, having been rendered upon actual notice in law, given within the state, could only be vacated on a case made bringing it within some of the statutory provisions giving relief in certain

cases from judgments thus rendered. No such case is here presented: See *Robertson v. Bergen*, 10 Id. 402; and *Woolley v. Woolley*, 12 Id. 663.

The judgment is affirmed, with five per cent damages, and costs.

JURISDICTION OF STATE COURTS IS LIMITED BY STATE LINES: *Lovejoy v. Abee*, 54 Am. Dec. 630; *Welch v. Sykes*, 44 Id. 689; *Wood v. Watkinson*, Id. 662; *Bimeler v. Dawson*, 39 Id. 430; *Smith v. Eaton*, 58 Id. 746; *Phelps v. Brewer*, 57 Id. 56; *Welch v. Sykes*, 44 Id. 689.

NECESSITY OF NOTICE OR PENDENCY OF SUIT: *Litchfield's Appeal*, 73 Am. Dec. 662, and note 666.

EFFECT OF SERVICE ON NON-RESIDENT: See *Eber v. Coffin*, 48 Am. Dec. 667; *Dearing v. Bank of Charleston*, Id. 300; extended note to *Flint River Steamboat Co. v. Foster*, Id. 273, showing the effect of voluntary appearance and constructive service. Non-resident cannot be made a party defendant to a personal action unless he be served with process: See note to *Dearing v. Bank of Charleston*, 48 Id. 319.

JURISDICTION OF COURTS OVER PERSONS AND PROPERTY WITHIN TERRITORIAL LIMITS OF STATE: *Molynaux v. Seymour*, 76 Am. Dec. 662, and note to same showing jurisdiction of foreigners and their property 665-673; *Smith v. Eaton*, 58 Id. 746.

COURTS CANNOT COMPEL CITIZENS OF ANOTHER STATE TO APPEAR: See note to *Newton v. Bronson*, 67 Am. Dec. 95.

NON-RESIDENCE IS NO DEFENSE if defendant has been legally served with process: See note to *Dearing v. Bank of Charleston*, 48 Am. Dec. 319.

COURTS OBTAIN JURISDICTION OF DEFENDANTS BY SERVICE OF PROCESS, either on their persons or on their property within the jurisdiction of the court: *Gilman v. Thompson*, 34 Am. Dec. 714.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and is the point stated: While the courts of one state may act *in personam*, upon an individual touching real property owned by him in another state, even to ordering him to sell it; yet if he refuses obedience to the order, the court cannot appoint a commissioner to make the sale in his stead, and is powerless to compel the sale: *Eaton etc. v. Hunt*, 20 Ind. 465. A judgment for alimony in a divorce case, though rendered upon publication, is binding and valid as a personal judgment, though judgments generally, when rendered upon such notice, are not so: *Beard v. Beard*, 21 Id. 322. A return is sufficient which shows that the summons was served by leaving a copy at the residence of the defendant: *Pigg v. Pigg*, 43 Id. 119. In proceedings to set aside a judgment taken through mistake, etc., the relief, under the original section 99 of the code, had to be granted within a year from the rendition of the judgment; but by this section as amended, if the proceedings are commenced within two years after the rendition of the judgment, the relief may be granted after the expiration of two years, and the pleadings are subject to amendment as in other cases: *Bush v. Bush*, 46 Id. 79. An action against a resident can only be commenced in vacation by the filing of a complaint and the issuing of a summons, and in term-time by the filing of a complaint and a voluntary appearance thereto: *McCormack v. First Nat. Bank etc.*, 53 Id. 470. The principal case was cited in *Hood v. State*, 56 Id. 270, to the question of juris-

diction generally. A return that summons was served upon defendant by leaving a true and certified copy at his last usual place of residence is sufficient to give jurisdiction of defendant's person: *Williams v. Hittie*, 83 Id. 308.

TRUSTEES OF WABASH AND ERIE CANAL v. SPEARS.

[16 INDIANA, 441.]

ONE MAY USE HIS OWN LAND AS HE PLEASES, so long as he is reasonably careful that such use shall not injure third persons. This doctrine is applied to the use of streets by cities, and highways by the state and counties, through their officers, and is to some extent applicable to private corporations.

THERE ARE MANY CONSEQUENTIAL DAMAGES THAT MAY HAPPEN TO OTHERS from the legitimate use of one's own property for which there is no redress. Such a loss is *damnum absque injuria*.

DAMAGES RESULTING FROM GRADING OF STREETS AND HIGHWAYS, so far as they consist simply in rendering the passage to and from adjoining property more inconvenient and expensive, constitute a loss for which there is no redress.

THERE ARE CONSEQUENTIAL INJURIES RESULTING FROM USE OF ONE'S OWN OR OF ANOTHER'S PROPERTY, for which damages may be recovered of the person causing them. An unauthorized obstruction or nuisance in a street or highway, occasioning special damage, constitutes such injuries. So might a nuisance injurious to the health and comfort of others, erected on one's own land.

DIVERSION OF SURFACE WATER FROM LAND OF ANOTHER, by excavations on one's own land; and the backing of water, by means of dams, etc., upon the lands of another, were injuries for which an action lay at common law.

INJURIES BY BACKING WATER seem to be embraced within the constitutional inhibition against injuring property by legislative authority, without making compensation.

IN SUIT AGAINST TRUSTEES OF WABASH AND ERIE CANAL TO RECOVER DAMAGES occasioned by overflow of plaintiffs' land, produced by said trustees' action in raising a dam across the Wabash river, and in cutting waste-ways through embankments, during the period between 1848 and 1854, it was held that the damages sued for were not occasioned by the taking of the land or materials of the plaintiffs, in the sense of the internal-improvement act of 1836, and were not recoverable in the special mode therein prescribed; but were consequential damages, recoverable in an action on the case at law, and that the two years' limitation for their recovery did not apply.

SUIT for damages. The facts are stated in the opinion.

R. C. Gregory, H. W. Chase, and J. A. Wilstach, for the appellants.

Z. Baird, J. E. McDonald, and A. L. Roache, for the appellees.

By Court, PERKINS, J. Suit by Spears and Case, commenced in 1854, to recover damages occasioned by the overflow of their land, produced by the action of the trustees of the Wabash and Erie canal in raising a dam across the Wabash river, and in cutting waste-ways through embankments, during the period between 1848 and 1854. Judgment below for the plaintiff.

The damages were not occasioned by the taking of the lands or materials of the plaintiffs, in the sense of the provision of the charter of the corporation (the internal-improvement act of 1836), and hence were not recoverable in the special mode therein prescribed, but belonged to the class of consequential damages recoverable in an action on the case at law: *Lafayette Plank Road Co. v. New Albany R. R. Co.*, 13 Ind. 90 [74 Am. Dec. 246]. Hence the two years' limitation for their recovery did not apply: 2 R. S. 75.

The opinion in the case may well be thrown into the form of a few propositions.

1. An individual may use his own land as he pleases, so that he is reasonably careful that such use shall not injure third persons: *Young v. Harvey*, 16 Ind. 314; *New Albany etc. R. R. Co. v. Peterson*, 14 Id. 112; Angell on Highways, 178 et seq.

This doctrine is applied to the use of streets by cities and highways by the state and counties through their officers: Angell on Highways, 181 et seq.; *Wood v. Mears*, 12 Ind. 515 [74 Am. Dec. 222]; *Protzman v. Indianapolis etc. R. R. Co.*, 9 Id. 467 [68 Am. Dec. 650]; *City of Madison v. Ross*, 3 Id. 236 [54 Am. Dec. 481]; *Wayne Co. Turnpike Co. v. Berry*, 5 Id. 286; *Snyder v. Rockport*, 6 Id. 237; Ind. Dig. 316; *Moses v. Pittsburg, F. W., & C. R. R. Co.*, 21 Ill. 516. It applies, to some extent at least, to private corporations: *New Albany and Salem R. R. Co. v. Peterson*, 14 Ind. 112; Angell on Highways, 189; *Lafayette Plank Road Co. v. New Albany R. R. Co.*, 13 Id. 90 [74 Am. Dec. 246].

2. There are many consequential damages that may happen to others from the legitimate use of one's own, for which they have no redress, which are *damna absque injuria*: Angell on Highways, 179, 186; see *Lynn v. Adams*, 2 Ind. 143; *Commissioners of Ham. Co. v. Mighels*, 7 Ohio St. 109; *New Albany etc. R. R. v. Peterson*, 14 Ind. 112. Damages resulting from the grading of streets and highways, so far as they consist simply in rendering the passage to and from adjoining property more inconvenient and expensive, fall within this class: Angell on Highways, *supra*; *City of Lafayette v. Spencer*, 14 Id. 399;

Protzman v. Indianapolis etc. R. R. Co., 9 Id. 467 [68 Am. Dec. 650].

3. But there are consequential injuries arising from the use of one's own or of another's property, which will render the person causing them liable to pay damages; as an unauthorized obstruction or nuisance in a street or highway, occasioning special damage: *Indiana C. R'y Co. v. Boden*, 10 Ind. 96, and cases cited; *Wood v. Mears*, 12 Id. 515 [74 Am. Dec. 222]. A nuisance injurious to the health and personal comfort of another, erected on one's own land, might be such. Diversion of surface water from the land of another, by excavation on one's own, and the backing of water, by means of dams, etc., upon the land of another, were injuries for which an action lay at common law: 3 Bla. Com. 217; Angell on Watercourses, 372; Angell on Highways, 186. And injuries by backing water seem to be embraced within the constitutional inhibition against injuring property by legislative authority without making compensation: Angell on Highways, 193, and note from Kent; *Noel v. Ewing*, 9 Ind. 59, and case cited; *Evansville etc. R. R. Co. v. Dick*, Id. 433. But in the case at bar, we have been cited to no legislative act authorizing the trustees to raise the dam, etc., whereby the injury sued for was occasioned.

The special findings in the case were, in one or two particulars, so contradictory as to neutralize each other; but they were upon immaterial questions, and there is nothing in the record inconsistent with the general verdict for the plaintiffs.

The judgment is affirmed, with one per cent damages, and costs.

ONE SHOULD SO USE HIS OWN PROPERTY as not to injure the property of another: See *Carson v. Godley*, 67 Am. Dec. 404, and note 412.

LIABILITY FOR DAMAGE TO OTHERS FROM ACTS DONE ON ONE'S OWN LAND: See extended note to *Hay v. Cohoes Co.*, 51 Am. Dec. 232-234; extended note to *Radcliffe v. Mayor etc. of Brooklyn*, 53 Id. 368, both discussing this subject.

PROPRIETOR MAY DO WITH HIS SURFACE WATER what he pleases, so long as he does not injure the neighboring proprietor: See note to *Earl v. De Hart*, 72 Am. Dec. 402.

EFFECT OF CAUSING BACKWATER BY RAISING DAMS, ETC., CAUSING OVERFLOW AND DAMAGE TO LAND-OWNERS ABOVE: See extended note to *McCoy v. Danley*, 57 Am. Dec. 684-693; *Garrett v. McKie*, 44 Id. 263; *Simmons v. Brown*, 73 Id. 66; *Roundtree v. Brantley*, Id. 470. Owner of dam must govern and control it that injury will not result to his neighbors: *Fraser v. Sears Union Water Co.*, 73 Id. 562, and note 564.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Where the common council of a city have acted within the scope of their authority as to changing the grade of streets, and consequential damages result, from the change of grade, to a property owner, the legislature may make provision for the payment of such damages; but where they have not done so, damages cannot be recovered against the city. Such consequential injury does not come within that clause of the constitution which prohibits the taking of private property for public use, without compensation first assessed and tendered: *Macy v. City of Indianapolis*, 17 Ind. 270. The principal case was followed in *New Albany etc. R. R. Co. v. Higman*, Id. 594. A suit will lie for the recovery of consequential damages to lands resulting from the erection of a public work, without a resort to the statutory remedy, where the property has not been taken for a public use: *New Albany etc. R. R. Co. v. Higman*, 18 Id. 78. The abstract right to recover resulting damages caused by the erection of embankments, piers, etc., where one has used his own property so as to injure another, was recognized in *New Albany etc. R. R. Co. v. Huff*, 19 Id. 319. Where it is necessary to erect dams and dig ditches, which are necessary for the proper construction, repair, or preservation of highways, the supervisors may perform the acts whether they damage any person or not. If they do cause damage, and the damage is of a character entitling the injured party to redress, the statute points out the mode in which it may be obtained: *McOster v. Burrell*, 55 Id. 423.

HARRISON v. MARTINSVILLE AND FRANKLIN R. R. Co.

[16 INDIANA, 505.]

GENERAL DENIAL PLEADED TO SUIT BY CORPORATION ADMITS the *de facto* existence of the corporation.

DEMURRER TO PARAGRAPH OF ANSWER MUST BE REGARDED AS HAVING BEEN SUSTAINED, but without exception taken, where an issue of law, upon such demurrer, is submitted to the court at the same time with the issues of fact for trial, under a general denial, and the finding of the court upon all the issues is for the plaintiff.

SUIT upon contract for subscription. The facts are stated in the opinion.

McDonald and Harrison, for the appellant.

D. McClure and J. W. Gordon, for the appellee.

By Court, PERKINS, J. Suit upon a contract of subscription to the Martinsville and Franklin Railroad Company. No exception was taken to the overruling of a demurrer to the complaint; hence no question of law was reserved upon the demurrer. The general denial was answered; hence the corporation was admitted to exist *de facto*.

An issue of law, upon a demurrer to a paragraph of the answer, was submitted to the court at the same time with the

submission of the issues of fact, upon the general denial; and as the judgment of the court upon all the issues was for the plaintiff, the demurrer must be regarded as having been sustained, but without exception taken. Upon the evidence, we cannot say the court erred in refusing a new trial. We have noticed all the errors assigned.

The judgment below is affirmed, with one per cent damages, and costs.

CORPORATE EXISTENCE OF PLAINTIFF IS ADMITTED BY DEFENDANT'S PLEADING GENERAL ISSUE: *Inhabitants of Orono v. Wedgewood*, 69 Am. Dec. 83; *Brown v. Illus*, 71 Id. 49; *West Winsted Savings Bank v. Ford*, Id. 66, and collected cases in notes thereto.

GODFREY v. GODFREY.

[17 INDIANA, 6.]

CIRCUIT COURT OF INDIANA IS ONE OF GENERAL AND UNLIMITED JURISDICTION; hence its authority to proceed in the trial of a cause need not affirmatively appear in the complaint.

OBJECTION FOR WANT OF JURISDICTION, IF IT EXISTS, MAY BE RAISED BY ANSWER, or at any subsequent stage of the proceedings.

IN PETITION FOR PARTITION OF LANDS, IT NEED NOT BE AVERRED THAT LAND LIES IN COUNTY WHERE SUIT IS BROUGHT, if such suit is brought in a court of general and unlimited jurisdiction, as in a circuit court of Indiana.

TREATY IS PUBLIC LAW OF WHICH JUDICIAL NOTICE WILL BE TAKEN BY COURTS.

OBJECTION TO PETITION FOR PARTITION, ON ACCOUNT OF INDEFINITE DESCRIPTION of land sought to be partitioned cannot be taken by demurrer. Such uncertain description may, however, be obviated by a motion to require the pleading to be made definite and certain by amendment.

WORD "HOLDING," AS USED IN INDIANA STATUTE CONCERNING PARTITION OF LANDS, does not require actual occupancy, but is equivalent to owning or having title to lands, etc.: See 2 R. S., p. 329, sec. 1.

ONE MAY HAVE PARTITION WITHOUT HAVING POSSESSION, or may have it even against an adverse claimant.

ANY PERSON, NOT MADE PARTY, MAY APPEAR AND SET UP TITLE IN HIMSELF to premises sought to be partitioned, and where such title is set up, and found against such person, there seems to be no good reason why partition should not be made among those to whom the land belongs, although such person may have been in possession.

FORMER AND PRESENT PRACTICE IN PARTITION.—Formerly, if the legal title was disputed, chancery would send plaintiff to a court of law to have it established before decreeing a partition. But in Indiana, the distinction between actions at law and suits in equity is now abolished by the code which governs actions for partition, and under the code, all questions of title, and perhaps of possession, may be settled in a suit for partition.

JUDGMENT IN PARTITION WILL BIND ONE WHO CLAIMS TITLE, unless he previously comes in and sets up his claim, if he has any. To demur is insufficient.

PETITION for partition of land. The facts are stated in the opinion.

J. M. Wilson and W. Z. Stuart, for the appellant.

N. O. Ross and R. P. Effinger, for the appellees.

By Court, WORDEN, J. This was a petition by the appellant against the appellees, for the partition of a certain tract of land. Miller demurred to the petition, and the demurrer having been sustained, the petitioner appeals.

The petition sets out, in substance, that by a treaty made October 23, 1826, between the United States and the Miami tribe of Indians, one section of land was granted to Louison Godfrey, a plat of which was filed and made a part of the petition. From the plat filed, it appears that the land lies in township 27 north, of range 8 east; but the particular section, or other definite description, does not appear. It is alleged that Louison Godfrey, in his life-time, sold and conveyed three hundred and forty acres of the tract, leaving in himself three hundred acres in the north part of the section, of which he died seised. It is alleged that Louison Godfrey left children and grandchildren, to whom the three hundred acres descended, one of whom was the petitioner, Shin-go-quah Godfrey, and the others are made defendants. It is also alleged that John W. Miller and Edward A. Godfrey (who are not heirs of Louison) each claim and pretend to have a title to the three hundred acres, or some part thereof, but the nature of their claims and title, and the amount of their respective interest, the petitioner did not know; that the petitioner does not know whether Miller and Edward A. Godfrey have any interest in the lands or not; but as she is informed that each of them pretend to have an interest and ownership therein, they are made defendants; that the petitioner is entitled to one fifth of the land, by inheritance from her grandfather, etc. Partition is prayed.

In support of the decision below, in sustaining Miller's demurrer, four objections are made to the petition in the brief of his counsel:

1. "It does not show that the lands lie in Miami county; and therefore it does not appear that the court had jurisdiction."

In the case of *Brownfield v. Weicht*, 9 Ind. 394, it was held

that the circuit court being one of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint. The objection for want of jurisdiction, if it exists, may be raised by answer, or at any subsequent stage of the proceedings. That case is decisive of the point here.

2. "The land is not sufficiently described."

There is, to be sure, no definite description of the land contained in the complaint, but the land sought to be partitioned is the north part of the section granted, by the treaty mentioned, to Louison Godfrey; and *certum est quod certum reddi potest*. The treaty is a public law, and may be noticed by the courts; hence, if that sufficiently describes the land, perhaps further particularity in the description would be unnecessary. We do not, however, decide that there is a sufficient description of the land, either directly or by reference to the treaty. But we think the uncertainty in description cannot be taken advantage of on demurrer. There are facts stated sufficient to constitute a cause of action. Those facts are, that three hundred acres in the north part of the section granted to Godfrey by the treaty descended to his heirs, of whom the petitioner is one, and entitled to partition thereof. The uncertainty in the description cannot be regarded in the same light as the omission of a fact necessary to be stated, in order to constitute a cause of action. The uncertainty in the description might have been obviated by a motion to require the pleading to be made definite and certain, by amendment: Code, sec. 90.

3. "The complaint only shows who are the owners of four fifths of the land, and does not aver that the petitioner does not know who is the owner of the other fifth."

There is a little confusion in the statement of the respective shares of the children and grandchildren of the reservee; and perhaps the shares, as set out, do not exhaust the whole of the land. But the petition states that the land descended to those children and grandchildren, and they are all made parties. We cannot perceive how Miller, who alone demurred, is interested as to the question of a proper division between the descendants of the reservee. Those descendants were made parties, and whether the petition set out the supposed rights of each properly, or not, made no difference to Miller; as a judgment in his favor would bind them, and a judgment against him would render it immaterial to him how the land was partitioned among them.

4. "The petitioner cannot have partition of the premises, because Miller is in possession of the whole, claiming an adverse title."

It is claimed that the petitioner cannot have partition without having possession. The contrary was held in the case of *Foust v. Moorman*, 2 Ind. 17. The present statute on the subject of partition provides that "all persons holding lands," etc., may have partition. We do not construe the word "holding," thus used, as requiring actual occupancy, but as equivalent to owning or having title to lands, etc.

It does not appear from the complaint that Miller is in possession, but simply that he claims title. But supposing he were in possession, claiming adversely, the objection, we think, would not be well taken. The statute provides that "any person interested in such estate may appear and plead any matter tending to show that the petitioner ought not to have partition, as prayed for; and the further pleadings shall be conducted as in actions at common law, until an issue in law or in fact shall be joined, which shall be determined as in other cases. If any person not named in the petition shall appear and plead as a defendant, or allege any title to any part of the premises, the petitioner may reply that such person has no estate in the premises, and may pray judgment, if he shall be admitted to object to the petition; and the petitioner may likewise reply, in answer to such plea, any other matter, in like manner as if he had not disputed such person's right to appear." 2 R. S. 1852, p. 330, secs. 5, 7.

These provisions clearly contemplate that any person, not made a party, may appear and set up title in himself to the premises sought to be partitioned. Where such title is set up, and found against such person, no reason is perceived why partition should not be made among those to whom the land belongs, although such person may have been in possession. Formerly, when proceedings for partition were regarded as chancery proceedings, where the legal title was disputed, the course was to send the plaintiff to law to have that title established, before proceeding in chancery for partition: *Foust v. Moorman*, 2 Ind. 17. The distinction between actions at law and suits in equity is abolished by the code. Actions for partition are governed by the code: 2 R. S. 1852, p. 174. Courts now having jurisdiction in partition have the power of settling questions of title: *Wolcott v. Wigton*, 7 Ind. 44. There seems to be no good reason why all questions of title and possession

may not, under the statute, be settled in the suit for partition. Perhaps the parties would be entitled to a new trial, as provided for in other cases involving titles, without cause shown; but this point need not be decided, as it does not arise.

Miller, in this case, did not come and ask leave to make defense, but was made defendant to the petition originally, which was just as well. It is alleged that he claimed title, and the proceedings would bar him, unless he came in and set up his claim, if he had any. Instead of demurring to the complaint, we think he should have set up his claim to the land, if he had any such claim.

The judgment is reversed, with costs. Cause remanded, etc.

JURISDICTION OF COURT OF GENERAL JURISDICTION IS PRESUMED: See note to *Kennedy v. Greer*, 54 Am. Dec. 448, and collected cases therein.

TREATIES ARE JUDICIALLY NOTICED: See extended note to *State v. Twitty*, 11 Am. Dec. 781, showing what laws courts will take judicial notice of, and of what laws they will not.

PETITIONER IN PARTITION MUST HAVE RIGHT OF POSSESSION: See note to *Merklein v. Trapnell*, 75 Am. Dec. 637, and extended note to *Nichols v. Nichols*, 67 Id. 703, on who may compel partition.

PARTITION AGAINST ADVERSE CLAIMANT: See *Harman v. Kelley*, 45 Am. Dec. 552; note to *Nichols v. Nichols*, 67 Id. 707; note to *Merklein v. Trapnell*, 75 Id. 638.

TITLE AS SETTLED BY PARTITION: *Nicely v. Boyles*, 40 Am. Dec. 638; *Louvalle v. Menard*, 41 Id. 165; *Brock v. Eastman*, 67 Id. 733; notes to *Merklein v. Trapnell*, 75 Id. 637.

JUDGMENT IN PARTITION, EFFECT OF: *Lessee of Pillsbury v. Dugan's Adm'r*, 34 Am. Dec. 427, and note 429; extended note to *Nicely v. Boyles*, 40 Id. 640-642.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: That land, in a foreclosure suit, was situated within the jurisdiction of the court, will be presumed in favor of the judgment of a court of general jurisdiction, where the record does not show the contrary: *Culp v. Philips*, 17 Ind. 210; *Burton v. Ferguson*, 69 Id. 489. A reply, averring a demand of possession after entry, and before suit brought to recover possession of real estate, is sufficiently certain on demurrer; but if it be too uncertain in particulars pointed out, it may, on application, be made more certain by amendment: *Kratemayer v. Brink*, Id. 511. Adverse possession is no objection to proceedings for partition: *Harmon v. Brown*, 58 Id. 212. An adverse claimant may set up his claim, and have it passed upon in partition proceedings: Id. Courts have power to adjust equities in partition suits: *Schee v. McQuilkin*, 59 Id. 275; *Cravens v. Kitta*, 64 Id. 587. Where the record shows that court below had jurisdiction, no objection on that ground can be made in the appellate court: *Thomas v. Wood*, 61 Id. 138. Where a complaint for an injunction alleges that the chief and only object of the suit is to obtain an injunction against the further prosecution and completion of certain public improvements on land contiguous to the plaintiff's, and which, he alleged, were illegal and unauthorized, it does not raise any question of title within

the meaning of the act defining the jurisdiction of courts of common pleas: *Sipe v. Holliday*, 62 Id. 10. Partition can be had of real estate under mortgage: *Cravens v. Kitts*, 64 Id. 587. Title may be put in issue, tried, and settled, in partition proceedings: *Miller v. Noble*, 86 Id. 530; and the decree is as conclusive as in any other action: *Lewis v. Greve*, 102 Id. 175; *Kenney v. Phillips*, 91 Id. 515. As the respective claims or titles of the parties may be put in issue and determined in an action for partition, it follows that a counterclaim, filed for that purpose, is proper: *Ferris v. Reed*, 87 Id. 125. Where a court of general jurisdiction takes jurisdiction and tries and determines a suit, the facts which give it jurisdiction need not affirmatively appear on the face of the complaint. Jurisdiction will be presumed unless the contrary appear, and that real estate, in controversy, was in the county where the action was commenced will be presumed: *Kinnaman v. Kinnaman*, 71 Id. 421; *Brown v. Anderson*, 90 Id. 95.

SCHNELL v. NELL.

[17 INDIANA, 22.]

INEQUALITY OF CONSIDERATION WILL NOT VITIATE AGREEMENT, as a general rule, but this doctrine does not apply to a mere exchange of moneys, the values of which are exactly fixed; it applies to the exchange of something of indefinite value, for money, or for some other thing of indefinite value.

MEER PROMISE TO PAY SIX HUNDRED DOLLARS FOR ONE CENT IS UNCONSCIONABLE AND VOID on its face, though the cent be tendered, unless the one cent mentioned is some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value.

MORAL CONSIDERATION ALONE WILL NOT SUPPORT PROMISE.

WHERE DISPUTED CLAIM IS LEGALLY GROUNDLESS, a promise made upon a compromise of it, or because of a suit brought upon it, is not binding.

HUSBAND NOT BOUND TO PAY WIFE'S LEGACIES WHERE SHE LEAVES NO PROPERTY.—If wife dies testate, but leaves no property out of which the legacies bequeathed by her can be satisfied, the husband is under no obligation to pay them, and his promise to do so is not binding upon him because the wife had no property of her own.

CONSIDERATIONS INSUFFICIENT TO SUPPORT PROMISE.—A wife died testate, but left no property with which to pay the legacies bequeathed by her, and her husband, after her decease, entered into a written agreement with the legatees by which he agreed to pay to them the several sums bequeathed to them by his wife, in consideration: 1. Of one cent; 2. Of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and 3. That she had expressed her desire by her will that they should have certain sums of money. Such an instrument will not support an action. The first consideration is invalid, because unconscionable. The second considerations are not good, because they were past considerations, and because they constituted no consideration for a promise to pay money to a third person. The third is not good, because a husband's veneration for the memory of his deceased wife is not a legal consideration for a promise to pay money to any third person.

ACTION upon an instrument described in the opinion, where other facts are stated.

James Morrison and C. A. Ray, for the appellant.

N. B. Taylor and A. Seidensticker, for the appellee.

By Court, PERKINS, J. Action by J. B. Nell against Zacharias Schnell upon the following instrument:

"This agreement, entered into this thirteenth day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, state of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, state of Indiana, and Donata Lorenz, of Frickinger, grand duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: Whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above-named second parties should receive the sum of two hundred dollars; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name at the time of her death, and all property held by Zacharias and Theresa Schnell jointly therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for and in consideration of all this, and the love and respect he bears to his wife; and furthermore, in consideration of one cent received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above-named sums of money to the parties of the second part, to wit, two hundred dollars to the said J. B. Nell; two hundred dollars to the said Wendelin Lorenz; and two hundred dollars to the said Donata Lorenz, in the following installments, viz., two hundred dollars in one year from the date of these presents; two hundred dollars in two years, and two hundred dollars in three years; to be divided between the parties in equal portions of sixty-six dollars and sixty-six and two thirds cents each year, or as they may agree, till each one has received his full sum of two hundred dollars.

"And the said parties of the second part, for and in consideration of this, agree to pay the above-named sum of money [one cent], and to deliver up to said Schnell, and abstain

from collecting any real or supposed claims upon him or his estate arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this thirteenth day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL. [SEAL.]

"J. B. NELL. [SEAL.]

"WEN. LORENZ." [SEAL.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered that the instrument sued on was given for no consideration whatever.

He further answered that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned neither separately nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point: See Ind. Dig. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay six hundred dollars:

1. A promise on the part of the plaintiffs to pay him one cent;
2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property;
3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true that, as a general proposition, inadequacy of consideration will not vitiate an agreement: *Baker v. Roberts*, 14 Ind. 552. But this doctrine does not apply to a mere

exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush, upon its face, if it be regarded as an earnest one: *Hardisty v. Smith*, 3 Ind. 39. The consideration of one cent is plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him on that ground. A moral consideration only will not support a promise: Ind. Dig. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding: *Spahr v. Hollingshead*, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations: Ind. Dig., 13; 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled: See *Stevenson v. Druley*, 4 Ind. 519.

The judgment is reversed, with costs. Cause remanded, etc.

INADEQUACY OF CONSIDERATION, CONTRACTS NOT AFFECTED BY, AS GENERAL RULE: *Woodfolk v. Blount*, 9 Am. Dec. 736; *Seymour v. Delaney*, 15 Id. 270, and note 299; *Hind v. Holdship*, 26 Id. 107, and note 109; but they may be, if the inadequacy is coupled with other delinquencies: *Lester v. Mahan*, 60 Id. 530.

GROSS INADEQUACY, UTTERLY WORTHLESS IN LAW AND IN FACT, EFFECT ON CONTRACTS: See *Spann v. Baltzell*, 46 Am. Dec. 346; note to *Hough's Adm'r's v. Hunt*, 15 Id. 572.

MORAL CONSIDERATION WILL SUPPORT CONTRACT, WHEN: *Cook v. Bradley*, 18 Am. Dec. 79; *Warren v. Whitney*, 41 Id. 406; *State v. Reigart*, 39 Id. 628; *Stafford v. Bacon*, 37 Id. 366, and note 371; *McMorris v. Herndon*, 21 Id. 515; *Cardwell v. Strother*, 12 Id. 326.

CONSIDERATION OF LOVE AND AFFECTION is not sufficient to support a contract: *Holley v. Adams*, 42 Am. Dec. 508, and cases cited in note thereto 511.

THE PRINCIPAL CASE WAS CITED IN EACH OF THE FOLLOWING AUTHORITIES, AND TO THE POINT STATED: A promise to give something for the compromise of a claim, for which there is no legal foundation whatever, is not sufficient to sustain a suit at law: *Smith v. Boruff*, 75 Ind. 416. Where the consideration of a contract is money, and nothing else, courts may determine its adequacy; but when the consideration is an indeterminate one, the rule is otherwise: *Wolford v. Powers*, 85 Id. 301, 304.

LEWIS v. PHILLIPS.

[17 INDIANA, 108.]

CLERK HAS NO AUTHORITY TO ISSUE EXECUTION, IN ABSENCE OF ANY STATUTORY PROVISION giving him such authority, without direction from the plaintiff or his attorney.

RIGHT TO ORDER OR DELAY EXECUTION EXISTS ONLY IN JUDGMENT PLAINTIFF, or those acting under him.

EXECUTION DEFENDANT CANNOT COMPLAIN THAT CLERK HAS ISSUED EXECUTION WITHOUT AUTHORITY, if plaintiff afterwards ratifies the act.

DEPUTY HAS NO RIGHT TO PRESUME that his principal has authority to issue execution.

DEPUTY ISSUING EXECUTION WITHOUT AUTHORITY AND PURCHASING AT SALE MADE, can take no advantage from his purchase, though no actual fraud entered into the transaction.

THIRD PARTY BUYING OF EXECUTION PURCHASER, WITH NOTICE that such purchaser took no beneficial title at the sale, takes nothing from his purchase.

NOTICE BEFORE PAYMENT OF ALL PURCHASE-MONEY IS EQUIVALENT TO NOTICE before the contract, even though the balance due is secured and the conveyance made.

THE opinion states the facts.

J. G. Jones, J. E. Blythe, and A. C. Donald, for the appellants.
Conrad Baker, for the appellee.

By Court, WORDEN, J. This was an action by Phillips against James Sutphen and his wife, Alexander C. Donald, Andrew Lewis, and Daniel Ward. The complaint alleges, in substance, that on March 30, 1859, the plaintiff recovered a judgment in the Gibson circuit court against Sutphen and wife, and a foreclosure of a mortgage for the sum of five hundred and seventy-five dollars, and costs. That at the time of the recovery of the judgment the plaintiff was, and ever since has been, and still is, a resident of the state of Pennsylvania, and that his attorney resided in the city of Evansville, in the state of Indiana. That at the time of the rendition of the judgment, and for six months thereafter, Lewis was the clerk of the Gibson circuit court, and Donald was his deputy. That soon after the rendition of the judgment, Lewis, by Donald, his deputy, without the knowledge or consent, order or direction of the plaintiff, or his attorney, issued to the sheriff a certified copy of the judgment of foreclosure and order of sale, under the seal of the court, by virtue of which the sheriff, having duly advertised the property, on May 4, 1859, sold the same, and the defendant Donald became the purchaser thereof, at the sum of one hundred and forty-nine dollars and fifty cents, and received the sheriff's deed therefor, the property being at the time worth eight hundred dollars. That Donald paid the purchase-money to the sheriff, who applied twelve dollars and fifty-five cents thereof to the costs, and paid the residue to Lewis, as clerk, in whose hands it remains. That neither the plaintiff nor his attorney had any knowledge, intimation, or suspicion of the issuing of the order of sale, or of the sale of the land by the sheriff by virtue thereof, until long after the sale and conveyance. That the defendants in the judgment of foreclosure are insolvent, and the premises mortgaged, the only property out of which the judgment, or any part of it, can be realized. That the defendants, Lewis and Donald, fraudulently, and without the authority, knowledge, or consent of the plaintiff or his attorneys, issued the execution for the purpose of enabling Donald to purchase the property at less than its value. That after the purchase of the land by Donald, he sold and conveyed the same to the defendant Ward for the sum of five hundred dollars, a part of which was paid down, and the residue remains unpaid. That if the plaintiff had known of the sale thus made by the sheriff, he would have bid on the property the amount of his judgment and costs, which he will do if the sale shall be set aside, and the property again exposed to sale.

Prayer that the sale be set aside, etc.

Process was returned "not found" as to Sutphen and wife, and the cause proceeded as to the other defendants, who filed a demurrer to the complaint, which was overruled, and they excepted. The defendants, Lewis, Donald, and Ward, then answered by general denial. The cause was tried by a jury, who found for the plaintiff generally, and rendered answers to special interrogatories propounded to them. Motion for a new trial overruled, and judgment setting aside the sheriff's sale and deed to Donald, and the deed from Donald to Ward.

The first error assigned is in overruling the demurrer to the complaint.

It is claimed that the clerk had authority to issue the execution without any direction so to do from the plaintiff or his attorney. In the absence of any statutory provision giving him such authority or making it his duty so to do, it is clear that he had no such authority. The clerk of a court, as such, has no more right to control or direct an execution upon a judgment than any other third person. The property in a judgment is in the plaintiff therein, and he alone, or those acting for him, have the exclusive right to order an execution or delay it. The following observations, made by the court in *Ex parte Hampton*, 2 G. Greene, 137, are pertinent here:

"It not unfrequently happens that the parties, plaintiff and defendant, in the exercise of right and in the spirit of justice and compromise, agree upon terms by which the stern and rigorous proceeding of law is stayed, and time and opportunity afforded for the defeated party to satisfy the demands of the law, with the consent of his successful antagonist. Courts will not prevent the parties from acting with conciliation and forbearance, promotive of convenience. To allow the officers of a court, or witnesses to whom fees may be due, to step in and control the cause, either before or after judgment, by ordering process to issue, would be a manifest privation of the rights of the parties. A judgment, when entered, is subject to the control of the party in whose favor it is. He, or his agent or attorney, may, in the use of the proper process of the law, enforce it, and no other person. If fees be due to the officers of the courts, or witnesses, and they are unreasonably delayed in their collection by the parties to the proceeding, the law gives them a remedy for services rendered. They may enforce their rights by proceeding against the party liable."

We are referred to the following statutory provisions, as authorizing the clerk to issue execution without the direction of the plaintiff: 2 R. S. 1852, secs. 428, 429, p. 133; *Id.*, sec. 635, p. 176. Section 428 provides that "at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and replevin bail, etc." This section should, probably, be construed to be a direction as to the manner of the execution when it issues, that is, against the debtor and replevin bail, rather than a direction to issue upon the expiration of the stay. But this point need not be and is not decided, as the provision has no application here, the judgment in question not having been stayed. Section 429 provides that upon judgments recovered against any officer, etc., for money received in a fiduciary capacity, or for a breach of any official duty, the clerk shall issue execution forthwith, returnable in ninety days, to be indorsed "not replevable," and it shall be so ordered in the judgment. It is obvious that this section has no application here.

Section 635 provides that "a copy of the order of sale, and judgment, shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution," etc.

The intention of the legislature was, by this section, to provide for the manner of carrying into execution judgments of foreclosure. A copy of the order of sale and judgment is to be issued, and thereupon the sheriff is to sell as upon execution. No direction is given by the statute as to the time when, or circumstances under which, the copy of the order, etc., is to be issued. It is obvious that it can be properly issued only when it is directed by the proper party.

Perhaps an execution defendant could not complain, where a clerk issues without authority of the plaintiff, if the plaintiff afterward acquiesces in it, and ratifies the act; nor could the plaintiff, under such circumstances, object that the clerk had no authority to issue the execution. Such, however, is not the case here. The plaintiff was ignorant of the fact that an execution had issued, until after the sale, and has done nothing to show an acquiescence or ratification.

The order of sale having been issued, and the sale having taken place, without the plaintiff's knowledge or authority,

he should not be injured thereby, and the sale should be set aside, unless the rights of third parties, who are innocent, would be injuriously affected. It is objected that the complaint is bad, for not averring that Donald had notice that Lewis, his principal, was not authorized by the plaintiff to issue the order.

The order of sale was issued by Donald, himself, as the deputy of Lewis, and so far as appears, without any special directions from the latter. Without directions from Lewis to issue the order of sale, Donald would have no right whatever to presume that Lewis had authority from the plaintiff. He cannot acquire an advantage, injurious to the plaintiff, from his own unauthorized act.

There was no error in overruling the demurrer. The evidence is in the record, and fully sustains the verdict.

Exceptions were taken to the ruling of the court, in excluding evidence having a tendency to negative actual fraud, and to the refusal of the court to instruct, as asked, on that subject. We shall not extend this opinion, by entering into these details, because the charges given accord with our opinion, as above expressed, and because the action is maintainable, and the judgment right, although no actual fraud be shown. Donald, having issued the order of sale without authority from the plaintiff, and without having shown directions from his principal to do so, can take no advantage, as against the plaintiff, from his purchase, although no actual fraud entered into the transaction.

A different question, however, arises as respects Ward, the purchaser from Donald. He, so far as appears, purchased without any knowledge of the improvident issuing of the order of sale. He could be required to look no further than to see that Donald's purchase was made under a judgment, and an execution that was warranted by the judgment: *Carpenter v. Doe*, 2 Ind. 465. Had he paid the purchase-money before notice, having received his deed from Donald, it is not perceived that his title could have been disturbed. The jury, however, returned in their special findings that, of the purchase-money, three hundred and sixty-six dollars remained due from him to Donald.

The question arises whether, under the circumstances, he can be regarded as a purchaser in good faith, and for a valuable consideration, before notice, and as such entitled to hold the land.

The rule on this subject, as laid down by Sugden, is that "notice, before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding the money be paid, is equivalent to notice before the contract." See 2 Sugden on Vendors, 7th Am. ed., 533, and notes. This rule, as to the necessity of payment of all the purchase-money before notice, has been sanctioned and acted upon by this court: *Dugan v. Vattier*, 3 Blackf. 245 [25 Am. Dec. 105]. This is, undoubtedly, the English doctrine, and it seems to accord, also, with the weight of American authorities: See observations and authorities collected, on this subject, in 2 Lead. Cas. Eq., 3d Am. ed., 101, 116. There are few, if any, cases, holding that the payment of part of the purchase-money, before notice, although the purchaser has taken a conveyance, is sufficient to enable him to hold the land, as against him who has a prior equitable right. But while this is the case, there is an evident tendency, in the decisions, to afford the purchaser relief and indemnity, in a proper case, by giving him a lien upon the land, or rather, by permitting him to make use of his legal title, to secure himself for the purchase-money paid before notice, and for improvements made on the land: See authorities above cited.

In Dart's Vendors and Purchasers, by Waterman, 389, it is said that "when the conveyance has been executed, and a part only of the money paid, before notice, the purchaser may, it is conceived, clearly avail himself of the legal estate, as a security, to the extent of the sum so paid." In the case here, the defendant Ward did not, either in his answer, or in any other manner, insist upon an indemnity. He asked for no relief, and in no manner raised the question whether he was entitled to be reimbursed for the amount paid before notice. The remark of Gibson, J., in *Youst v. Martin*, 3 Serg. & R. 423, 433, in reviewing former English decisions upon this question, is applicable here. He says: "In none of the cases on the subject did the defendant insist on indemnity, but on the contrary claimed the land itself, insisting that part payment gave him an indefeasible title."

The purchase-money due from Ward to Donald not being all paid, and that fact being sufficient to prevent him from holding the land, as against the plaintiff, and no question having been raised as to Ward's right to be indemnified for the amount he had paid, the judgment must be affirmed.

The question whether a purchaser is entitled, in any case, to hold the land as an indemnity for what he has paid before notice, and if so, under what circumstances, it is unnecessary that we should decide.

The judgment is affirmed, with costs.

ISSUANCE OF EXECUTION BY CLERK WITHOUT AUTHORITY will be good if ratified by the creditor: *Clarkson v. White*, 20 Am. Dec. 229.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: As a general proposition, the clerk of a court is not required nor authorized to issue execution upon a judgment, without the authority or direction of the party in whose favor it is rendered, his agent or attorney: *State v. Wilkins's Adm'r*, 21 Ind. 217; *Watt v. Alvord*, 25 Id. 535. Notice, before actual payment of all the money, although it be secured and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract; and is sufficient to charge lands, in the hands of a purchaser, with all the claims, legal or equitable, which third parties may have upon it: *Heck v. Fink*, 85 Id. 9; *Barton v. Reagan*, 75 Id. 81; *Anderson v. Hubble*, 93 Id. 579; *Rhodes v. Green*, 36 Id. 10. Purchasers having no notice of any fraud when they take their deed and pay their first installment of the purchase-money may be protected as to the amount paid by them on the land. But they cannot claim to be innocent purchasers until they have made the purchase, received the deed, and paid the whole of the purchase-money: *Rhodes v. Green*, 36 Id. 10. In *Routh v. Spencer*, 38 Id. 393, it was held that an assignment operating as a mortgage, if unrecorded, is invalid as against the purchaser of the real estate. But Downey, J., dissented, on the ground that the purchaser was not protected from the lien of the unrecorded mortgage, so far as there was money still owing from him as purchase-money. "It has," said he, "been repeatedly decided by this and other courts, that to constitute one a purchaser in good faith and for a valuable consideration, he must not only have purchased the real estate, but he must have received his deed therefor and paid the purchase-money. This rule has of late been supposed to be a hard one, and the inclination in this court has been to hold that the purchaser will be protected to the extent of the payments which he had made before notice. But it has never before been held that the real estate is not liable to, and bound by, the lien or equity to the extent of the purchase-money yet unpaid at the time the purchaser receives notice of the equity." To this the principal case was cited at page 400. A person claiming title through a sale upon execution is only required to show a valid judgment, execution, and sheriff's deed: *Splahn v. Gillespie*, 48 Id. 401. As to the statute construed to be directory, see *Misemacher v. Ingle*, 20 Id. 138.

PHILLIPS v. REICHERT.

[17 INDIANA, 120.]

WHERE THERE IS ENTIRE FAILURE OF TITLE TO REAL ESTATE CONVEYED WITH COVENANTS OF WARRANTY, measure of damages for breach of covenants, in absence of fraud, is the purchase-money and interest.

WHERE EVICTION IS PARTIAL, DAMAGES WILL BEAR SAME PROPORTION TO WHOLE PURCHASE-MONEY that the value of the part to which the title fails bears to the whole premises, estimated at the price paid

COVENANTS BIND COVENANTOR THAT HE IS SEISED OF LAND, AND THAT HE WILL WARRANT AND DEFEND TITLE, or in default thereof, that he will return the purchase-money and interest; or if the title fail in part, that he will return a ratable proportion of the purchase-money and interest.

FACT THAT LAND WAS BOUGHT FOR PARTICULAR PURPOSE, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants.

FRAUD AS GROUND OF DAMAGES.—Where title to land fails in whole or in part, and fraud can be shown, or concealment, which would be evidence of it, it will constitute a good ground of action, in which the purchaser can recover all his damages.

BASIS OF DAMAGES FOR PARTIAL FAILURE OF TITLE is the relative general value of the part to which the title fails compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value.

ACTION upon promissory note, and to foreclose a mortgage. The facts are stated in the opinion.

Conrad Baker and J. P. Edson, for the appellants.

Alvin P. Hovey, for the appellee.

By Court, WORDEN, J. Action by the appellants against the appellee, upon a promissory note, and to foreclose a mortgage, executed by Reichert to one Charles Graddy, and by the latter indorsed to the plaintiffs.

The note was for one hundred and fifty dollars, and was given in part consideration for the sale of a certain piece of land, by Graddy, to the defendant, which was conveyed by deed of general warranty. The entire purchase-money was six hundred dollars, and the note in suit was for the last payment.

Defense, that the defendant had been evicted from part of the premises by a paramount title. That he purchased the premises expressly for the purpose of erecting a lager-beer cellar, in a ravine on the part thereof from which he has been evicted, and that the part from which he has been ousted is indispensable to the trade and business of a brewer for such cellar, and that the lot is not worth as much by two hundred dollars as the defendant agreed to pay for the same, in consequence of said ouster.

Issue, and trial by the court. Finding and judgment for the defendant.

The court found specially the following facts, on which the question here involved depends:

"2. That said lot, at the time of the purchase thereof by the defendant from Graddy, had erected thereon a dwelling-house,

which is still on said lot; and that one of the main objects for which the lot was purchased was that said defendant might erect a lager-beer cellar thereon, which object was known to Graddy at the time of the purchase.

"3. That since said conveyance, the said defendant has been evicted from the west end of said lot by a paramount title, the said Graddy not being the owner in fee of the west end of said lot, at the time of said conveyance.

"4. That the whole price or purchase-money of said lot was six hundred dollars, and that by reason of the failure of title to the west end thereof, it is unfit for the purpose for which it was, in part, purchased, and is therefore worth to the defendant two hundred dollars less, for the purpose for which he purchased, than the entire lot would have been worth.

"5. That the general value, that is, the value for ordinary purposes, of that part of the lot to which the title failed as aforesaid, was thirty dollars, taking the entire purchase-money, or six hundred dollars, as the criterion of the value of the whole lot.

"6. The court, therefore, finds generally for the defendant."

Motion for a new trial overruled.

The question presented is, whether the court adopted the correct rule as to the measure of damages. The measure of damages, it is evident, must be the same as if the defendant were suing Graddy for a breach of the covenants in his deed.

It is well settled that where there is an entire failure of title, the measure of damages for a breach of the covenants, in the absence of fraud, is the purchase-money and interest: *Reese v. McQuilkin*, 7 Ind. 450.

It would seem to follow, as a corollary of this rule, that where the eviction is partial, the damages will bear the same proportion to the whole purchase-money as the value of the part to which the title fails bears to the whole premises, estimated at the price paid. This, accordingly, seems to be the settled rule: *Rawle on Covenants*, ed. 1860, 88; *Sedgwick on Damages*, 8d ed., 175; *Cornell v. Jackson*, 3 Cush. 510; *Morris v. Phelps*, 5 Johns. 49 [4 Am. Dec. 323]; *Giles v. Dugro*, 1 Duer, 331; *Wiley v. Howard*, 15 Ind. 169.

But it is claimed that inasmuch as the lot was purchased for a particular purpose, which was known to the vendor, and as the failure of title to a part renders the premises useless for that purpose, the case is taken out of the rule indicated. The counsel for the appellee admits that there are no authorities

directly sustaining the position thus assumed. We have looked, within a limited range, for authorities upon this point, but find none. The absence of authority sustaining the position is some evidence, at least, that such is not the law. An analogy is sought to be drawn from the rule that where goods are ordered from a manufacturer for a particular purpose, there is an implied warranty that they shall be fit for the purpose designed. Such warranty may well be implied, and yet furnish no analogy for settling the rule of damages on a breach of the express warranty of title contained in the covenants of a deed.

We think, in principle, the fact that land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants. The purpose for which the land was bought does not enter into the covenants. They bind the covenantor that he is seised of the land, and that he will warrant and defend the title, or in default thereof, that he will return the purchase-money and interest, or if the title fail in part, that he will return a ratable proportion of the purchase-money and interest. The fact that the land was bought for a particular purpose cannot have the effect of increasing the liability thus imposed by the covenants. If the land was sold in good faith, and without fraud, the vendor supposing he had title to the whole, no reason is perceived why he should be held to a greater degree of liability on his covenants than if he had not known the purpose to which the purchaser intended to apply it. In the case of *Dimmick v. Lockwood*, 10 Wend. 142, 155, it was said by the court: "One ground assumed by Kent, when chief justice, in *Staats v. Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254], and also by Chief Justice Tilghman, in *Bender v. Fromberger*, 4 Dall. 436, is this: 'That the title of land rests as much in the knowledge of the purchaser as the seller; it depends upon writings, which both can examine.' Again: 'It is agreed on all hands that if fraud can be shown, or concealment, which would be evidence of it, that would constitute a good ground of action, in which the purchaser could recover all his damages.'"

We have not examined the question whether the defendant might not, had he chosen to do so, have rescinded the contract, on the failure of the title to that part which constituted the principal inducement to the purchase; but whether he could have done so or not, we think the thirty dollars, found by the

court to be the value of the part to which the title failed, taking the purchase-money as the criterion of the value of the whole, was the true measure of damages; and therefore, that the court should not have found, generally, for the defendant.

It should be observed, however, that perhaps the fifth finding of the court does not furnish a strictly accurate basis for the assessment of damages. If the value of the part to which the title failed is less "for ordinary purposes" than it is for any particular purpose to which it is adapted and may be applied, as, for instance, a lager-beer cellar, the basis is wrong. The basis should be its relative, general value, compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value.

A new trial should be awarded.

The judgment below is reversed, with costs.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE to land is the purchase-money, with interest from the time of the purchase: *Davis v. Smith*, 48 Am. Dec. 279, and note 297, referring to other cases in this series; *Elliot v. Thompson*, 40 Id. 630, and note 632; *Drew v. Tindle*, 64 Id. 309, and note 315; *King v. Kerr's Administrators*, 22 Id. 777; *Dickson v. Desire's Administrator*, 66 Id. 661, and collected cases in note thereto 670; *Fernander v. Dunn*, 65 Id. 607; see also *Ferriss v. Harshea*, 17 Id. 782, and cases cited in note to same, where the measure of damages for breach of covenant of warranty is said to be simply the value of the land at the time of the contract. For purchaser's remedy after conveyance, where there is no fraud, etc., and the title fails, see note to *Woodruff v. Bunce*, 38 Id. 560.

MEASURE OF DAMAGES FOR FAILURE OR DEFECT OF TITLE TO PART OF LAND: See *Beaupland v. McKeen*, 70 Am. Dec. 115, and note 122; *Carnel v. May*, 12 Id. 453; *McConnell v. Dunlop*, 3 Id. 723.

MEASURE OF DAMAGES FOR FRAUD IN SALES OF REAL OR PERSONAL PROPERTY: See *Campbell v. Hillman*, 61 Am. Dec. 195, and collected cases in note thereto 201.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where there is a failure of title to a part of a tract of land purchased and taken possession of, and there is not a rescission of the contract on that account, the measure of damages on eviction from such part, in the absence of special circumstances, is a sum bearing the same proportion to the price of the whole that such part bears to the entire tract of land: *Hoot v. Spade*, 20 Ind. 327. There will be found in the notes to this case many authorities bearing on the rule to be applied where there is a failure of title to only a part of the property sold. Damage for the lost tract or portion must be in proportion to its relative value and importance, when taken in connection with the whole: *First Nat. Bank etc. v. Colter*, 61 Id. 160. Where there has been a judgment of partial eviction, and the title of the adverse claimant has not been purchased by the one evicted, he will be entitled to recover a corresponding part of the consideration paid: *Mooney v. Burchard*, 64 Id. 286. Where there is a failure of title as to the whole tract conveyed,

and there has been a legal eviction, the consideration money with interest is the correct measure of damages for breach of covenants for title: *McClure v. McClure*, 65 Id. 487; *American Cannel Coal Co. v. Seitz*, 101 Id. 185. If, however, the eviction be from only a specific part of the land conveyed for a gross sum, the damages are to be computed by adding interest to the sum bearing the same ratio to the whole purchase-money that, at the time of the conveyance, the value of such specific part of the land bore to the value of the whole land conveyed; that is, for ascertaining on what portion of the purchase-money to compute interest, the relative value, instead of the average value, of the specific part from which there has been an eviction, is to be regarded, and such relative value is to be ascertained with reference to the time of the conveyance, instead of the time of the trial: *American Cannel Coal Co. v. Seitz*, *supra*.

FLOURNOY v. CITY OF JEFFERSONVILLE.

[17 INDIANA, 169.]

SET-OFF CAN ONLY BE MADE AGAINST REAL PARTY IN INTEREST.

REMEDY AT TIME OF BRINGING SUIT MUST BE FOLLOWED; not a remedy in force when the cause arose but which has since been repealed.

LEGISLATURE MAY CHANGE LEGAL REMEDIES, so it does not substantially impair them.

BRINGING ACTION, THOUGH ERRONEOUS IN FORM, WILL SAVE CLAIM FROM BAR OF STATUTE OF LIMITATIONS, under the Indiana statutes.

REMEDY FOR COLLECTING DUES FOR STREET IMPROVEMENTS by precept from the council, mayor, and clerk of the city, is constitutional.

ISSUING WRIT IS MINISTERIAL ACT, and may be performed by any one on whom the law may cast the duty.

ISSUING OF PRECEPT FOR COLLECTION OF ASSESSMENT FOR STREET IMPROVEMENT IS MINISTERIAL ACT, and not a judicial one.

JUDICIAL ACTS ARE SUCH AS ARE PERFORMED by a court touching the rights of persons or property.

MINISTERIAL ACT IS ONE WHICH PERSON PERFORMS under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.

THE opinion states the facts.

J. W. Ray, H. C. Newcomb, and J. Turkington, for the appellant.
J. F. Read, for the appellee.

By Court, PERKINS, J. In 1854, the city of Jeffersonville, Indiana, acting under the general law of 1852 for the incorporation of cities, made a contract with Calvin Cook for the grading and graveling of a street in said city. Cook performed the work stipulated in his contract, and an assessment for payment was made, but one of the property holders, before whose property grading was done, refused payment.

In 1860, the city instituted a suit in the court of common

pleas of Clark county, by filing a complaint against the original owner, and subsequent purchasers, to enforce payment of said assessment for the benefit of the contractor.

The amount sued for was over three hundred dollars. There was a demurrer to the complaint overruled. The defendant answered to the whole of action cause, a set-off of about sixty dollars, as against the city.

This answer was bad, for two reasons: 1. The city was a mere nominal party: Cook was the beneficiary; 2. The answer purported to go to the whole cause of action, while it was a bar to but part.

Most of the other questions raised and discussed in the cause are settled in *City of Indianapolis v. Imberry*, 17 Ind. 175, and need not be noticed here.

There is another reason why we should not consider them. This suit cannot be sustained. It was a mode of proceeding prescribed by the charter of 1852, but that charter was repealed in 1857, except as to existing rights, and an entirely different mode of proceeding prescribed. The right, not the remedy, except where suits were pending, was saved in the repeal. The new remedy was re-enacted in 1859, and is probably still the law: Acts 1861, p. 32. Perhaps the amendments in these acts do not reach this part of the remedy.

The suit by the city to enforce the payment of a demand of a contractor against a third person, the city not having first paid it, could not probably be maintained, simply by virtue of our code of pleading, which requires suits to be brought in the name of the party having the beneficial interest. No person had any contract with the property holders. The city enforced payment from them, not by virtue of a contract, but through statutory law; through the provision of the charter authorizing it, and only by that means, as the city was not liable, in any event, to the contractor for his pay, as against the property holders, and had no common-law ground for a suit against them. The provision furnishing this special remedy having been repealed, and another remedy substituted by a new enactment, the former remedy fell, and the latter became the one to be adopted.

This resulted from the two established principles, that the legislature may change, so it does not substantially impair legal remedies: *Maynes v. Moore*, 16 Ind. 116; and that where the legislature creates by statute a right and an accompany remedy, that remedy must be pursued: See the cases

cited in *Protzman v. Indianapolis and C. R. R.*, 9 Ind. 467 [68 Am. Dec. 650], and the common-law remedy cannot be: 1 Hilliard on Torts, 1st ed., 111.

It may be observed with propriety here that the suit prosecuted in this case, though erroneous in form, so that it cannot be maintained, will nevertheless save the claim of the plaintiff from the bar of the statute of limitations. Our statute enacts (2 R. S., sec. 218, p. 77) that "if after the commencement of an action the plaintiff fail therein, from any cause except negligence in the prosecution, or the action abate, or be defeated, by the death of a party, or judgment be arrested or reversed on appeal, a new action may be brought within five years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated."

A mistake as to the form of remedy is not "negligence in the prosecution" of the suit, within the intent of the above section, according to the case of *McKinney v. Springer*, 3 Ind. 59 [54 Am. Dec. 470].

The question is raised in the case at bar, and also in two other cases, *City of Indianapolis v. Imberry*, 17 Ind. 175, and *City of Logansport v. Blakemore*, Id. 318, whether the new remedy provided for the collection of dues for street improvements, viz., by precept from the council, mayor, and clerk of the city, is constitutional; and we will dispose of the question for all the cases in this one.

We have been unable to put our finger upon any provision of the constitution of Indiana with which the provision of the statute prescribing the remedy in question conflicts. We lay down and indicate the following propositions, though involving some repetitions:

1. The provision, in substance, prescribes a mode of getting a cause into court, and it is not unconstitutional, because it authorizes another officer than the clerk of the court to issue the first process, by which judicial proceedings are initiated. The constitution does not give to the clerk the exclusive right to discharge any particular duty; but declares that he shall perform such as may be prescribed by law: Art. 6, sec. 6.

The issuing of the writ is a ministerial act, and may be performed by any person upon whom the law may cast the duty.

It issues upon an affidavit, as matter of course; and is as much a ministerial act as is the issuing of an attachment, or writ of replevin, by the clerk of the court upon affidavit, or of a summons upon a complaint in court vacation. It is quite

analogous to the original writ, at common law, which issued in the king's name, under his great seal, directed to the sheriff of the county where the injury was alleged to have been committed, requiring him to command the defendant to satisfy the claim; and on his failure to comply, then to summon him to appear in some one of the courts, the particular one being named, but not that from which the writ issued, as it did not issue necessarily from a court, to account, etc.: Stephen's Pleading, 5. Here, the party, if he does not elect to satisfy the claim, may transfer his cause to a court by appeal, instead of by appearing to a summons.

The case is very like that of *Maynes v. Moore*, 16 Ind. 116, where the auditor of state, as a ministerial officer, was authorized to issue the writ commanding satisfaction, but which, if the party did not see fit to obey, he could enjoin, and thus transfer his cause to a court by injunction, instead of by answering to a summons. A suit need not necessarily go into court by a writ from the clerk: *Gaston v. Board of Commissioners*, 3 Id. 497; *Lake Erie and St. L. R. R. Co. v. Heath*, 9 Id. 558.

2. The provision is not unconstitutional because it deprives a party of a right without a judicial hearing and trial by jury. As in the *Maynes* case by injunction, expressly authorized by the statute as a part of the remedy, so here by appeal from the issue of the precept, the writ, the party can transfer his case to a judicial tribunal, and demand the right of trial by jury. The remedy is not an onerous, a burdensome one, even.

3. The provision is not unconstitutional, because it imposes upon a ministerial officer the performance of a judicial act.

The issuing of the writ, as we have said, is a ministerial act, as much as the issuing of an attachment, or *capias* for the arrest of the body, upon an affidavit.

Judicial acts, within the meaning of the constitution of Indiana, are such as are performed in the exercise of judicial power. But the judicial power of this state is vested in courts. A judicial act, then, must be an act performed by a court touching the rights of parties or property, brought before it by voluntary appearance, or by the prior action of ministerial officers—in short, by ministerial acts: See *Waldo v. Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court *ex parte*, are judicial acts: 3 Bla. Com. 25.

And the act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts v. Dimon*, 3 Conn. 107, where it was held that the administration of the poor-debtor's oath was a ministerial, not a judicial, act. Hosmer, C. J., in delivering the opinion of the court, said: "Every selectman before the appointment of an overseer, and every sheriff previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

So in *Crane v. Camp*, 12 Conn. 463, it was held that a justice of the peace acted ministerially in appointing freeholders to assess damages sustained by taking land for a public highway, though it was necessary for him to make inquiry as to the fitness of the persons appointed.

A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.

4. The provision is not unconstitutional because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined. This is done in cases of attachment and replevin, without objection; and is a matter in the discretion of the legislative power in creating remedies. It must not deprive a party of his property without a judicial hearing, but the stage of proceedings at which that hearing shall take place—the manner, in short, in which the cause of a party shall be got before the judicial tribunal, so it is not an unreasonably inconvenient and embarrassed one—is with the legislative power: *New Albany and S. Railroad Co. v. Connelly*, 7 Ind. 32. We think the remedy in the amended charter is not an unconstitutional one.

The judgment is reversed, with costs. Cause remanded, etc.

JUDICIAL AND MINISTERIAL ACTS DISTINGUISHED.—The distinction between what is to be deemed a judicial act and what a ministerial act merely, as traced and defined in the principal case, is approved and adopted in *Pennington v. Streight*, 54 Ind. 377; *State v. Board of Commissioners*, 45 Id. 506; *Shoults v. McPheters*, 79 Id. 377. The distinction is important, since duties purely ministerial in their nature are sometimes cast upon officers whose chief functions are judicial: See *People v. Prosser*, 34 Cal. 520; *People v. Bush*, 40 Id. 344; and where this occurs, and the ministerial duty is violated, the officer is civilly responsible for such misconduct, though for most par-

poses he is clothed with judicial power. But a different rule prevails where the duty alleged to have been violated is purely judicial; for it is well settled that no civil action lies for misconduct or delinquency, however gross, in the performance of judicial duties: *Wilson v. Mayor etc.*, 1 Denio, 595; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Lange v. Benedict*, 73 Id. 12; affirming 8 Hun, 362; *Bradley v. Fisher*, 13 Wall. 351; *Randall v. Brigham*, 7 Id. 523; *Burnham v. Stevens*, 33 N. H. 247; *Elmore v. Overton*, 104 Ind. 550. So officers acting within the scope of their jurisdiction and in pursuance of discretionary power devolved upon them, will not ordinarily be held responsible for an error of judgment. Discretion implies to a certain extent judicial functions, and where an officer acts in such a capacity, in order to render him personally liable it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice: *Reed v. Conway*, 20 Mo. 22; *Schoettgen v. Wilson*, 48 Id. 253; *Edwards v. Ferguson*, 73 Id. 686; *Caulfield v. Bullock*, 18 B. Mon. 494; *Weaver v. Devendorf*, 3 Denio, 120; *Burton v. Fulton*, 49 Pa. St. 151; *Gregory v. Brooks*, 37 Conn. 365. But while this is true as it respects an act which is in any sense judicial, yet the general rule is, that public officers, charged with a ministerial duty, are answerable in damages to any one specially injured by their negligent performance of or an omission to perform the duties of their office: *Amy v. Supervisors*, 11 Wall. 136; *Olark v. Miller*, 54 N. Y. 528; *Hover v. Barkhoof*, 44 Id. 113; *Bennett v. Whitney*, 94 Id. 302; *Piercy v. Averill*, 37 Hun, 360; *Raynsford v. Phelps*, 43 Mich. 345. And an act is none the less ministerial because the person performing it may have to satisfy himself of certain facts before his duty can be performed: *Ray v. City of Jeffersonville*, 90 Ind. 572, citing the principal case. A duty imposed by law upon an officer is said to be ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to him: *Morton v. Comptroller-General*, 4 S. O. 430, 474. It is a duty in respect to which nothing is left to discretion: *Sullivan v. Shanklin*, 63 Cal. 247, 251; *Mississippi v. Johnson*, 4 Wall. 496; *Piercy v. Averill*, 37 Hun, 360.

MINISTERIAL ACT OF JUDICIAL OFFICER.—A judicial-officer may be empowered to perform ministerial acts, and when performed, they do not become judicial acts because they were performed by a judicial officer: *People v. Provinces*, 34 Cal. 520; *People v. Bush*, 40 Id. 344. The appointment of a member of the board of supervisors by a county judge is an instance of a ministerial and not a judicial act: Id. So the issuance of a writ of replevin for the seizure and delivery of personal property, in an action to recover its possession, is merely a ministerial act, which may be delegated to and performed by the clerk, during the term of court: *Pennington v. Streight*, 54 Ind. 376. But the power of admitting to bail is declared to be a judicial one, which cannot be delegated to the clerk or other ministerial officer, for the reason that it is judicial: *State v. Hill*, 3 Ired. 398; *Morrow v. State*, 5 Kan. 563; *State v. Clark*, 15 Ohio, 595; *State v. Crippen*, 1 Ohio St. 399; *Jacqueline v. State*, 48 Miss. 280; *Solomon v. People*, 15 Ill. 291; and see *Short v. State*, 16 Tex. App. 44. So fixing the amount of bail is a judicial act, which cannot be delegated: *State v. Winniger*, 81 Ind. 51; *Gregory v. State*, 94 Id. 384. But approving and accepting bail after it has been fixed by competent authority is a ministerial act, and may be performed by a ministerial officer: Id. Granting letters testamentary or of administration is held to be a judicial and not a ministerial act: *Ray v. Doughty*, 4 Blackf. 115; *Landers v. Stone*, 45 Ind. 404. So the admission and removal of attorneys are judicial acts: *Ex parte Seecombe*, 19 How. 9; *Ex parte Garland*, 4 Wall. 378; *Randall v. Brigham*, 7 Id.

523. But the allowance or disallowance by a judge, in vacation, of a writ of *habeas corpus* is not a judicial but a ministerial act: *Yates v. Lansing*, 5 Johns. 232.

ACTS OF QUASI JUDICIAL OFFICERS.—Quasi judicial powers may be conferred upon tribunals which are not courts in the strict sense of the term: See, as an illustration, *United States v. Ferreira*, 13 How. 40. So large discretionary powers may be intrusted to executive, administrative, and ministerial officers in matters pertaining to the duties of their respective offices. And the cases in which this class of officers must seek information as to the existence or non-existence of certain facts, and then form a judgment and act accordingly, upon whatever information they may be able to obtain, are very numerous. In addition to the illustrations in the principal case, see *State v. Johnson*, 105 Ind. 463; *Elmore v. Overton*, 104 Id. 548. Thus, in some particulars, the duty of assessors is clearly ministerial; but in fixing the value of taxable property, the power exercised is in its nature purely judicial: *Weaver v. Devendorf*, 3 Denio, 117; so they act judicially in determining what property is subject to, and what is exempt from, taxation: *Id.*; *Chegaray v. Jenkins*, 5 N. Y. 376; *Brown v. Smith*, 24 Barb. 419; *Barhyte v. Shepherd*, 35 N. Y. 238; and generally, having jurisdiction of the person taxed and of the subject-matter, their acts partake of a judicial character, and however erroneous the assessment may be, they are not individually liable therefor: *Williams v. Weaver*, 75 N. Y. 30; *Buffalo etc. R. R. Co. v. Supervisors*, 48 N. Y. 93, 105; *Stewart v. Fonda*, 19 Hun, 191; *Macklot v. Davenport*, 17 Iowa, 379; *Wall v. Trumbull*, 16 Mich. 238; *McDaniel v. Tebbetts*, 60 N. H. 497; *Steam Nav. Co. v. Wasco Co.*, 2 Or. 206; *Wilson v. Marsh*, 34 Vt. 352; *Lilienthal v. Campbell*, 22 La. Ann. 600; *San Jose Gas Co. v. January*, 57 Cal. 614. So a board of registration of voters, in passing upon the right of a party to be registered or not, act judicially: *Fausler v. Parsons*, 6 W. Va. 486; S. C., 20 Am. Rep. 431; so, of election officers in passing upon the qualifications of a person offering to vote: *Christmas v. Bruce*, 1 Duv. 166; *Müller v. Rucker*, 1 Bush, 135; *Morgan v. Dudley*, 18 B. Mon. 711; *Beard v. Hoffman*, 18 Md. 479; *Elbin v. Wilson*, 33 Id. 135; *Lombard v. Oliver*, 3 Allen, 1; *Carter v. Harrison*, 5 Blackf. 138. Though it seems that the action of such officers in asking a question, and in rejecting a vote because of a refusal to answer, is in its nature ministerial: See *Goetcheus v. Matthevson*, 61 N. Y. 420; *Gillespie v. Palmer*, 20 Wis. 544. A board of school directors, in deciding upon the removal of a teacher, act judicially: *Burton v. Fulton*, 49 Pa. St. 151; so, of the board of county commissioners in deciding upon an application for a permit to sell intoxicating liquors: *State v. Board of Commissioners*, 45 Ind. 501; and see *Schlaudecker v. Marshall*, 72 Pa. St. 200; *City of Louisville v. Kean*, 18 B. Mon. 9; so, of a township board in auditing claims against the township: *Wall v. Trumbull*, 16 Mich. 228; so a county superintendent of common schools acts so far judicially in granting or withholding a license to teach, as to be protected from any claim for damages on account of a mere mistake in his decision, or error in judgment: *Elmore v. Overton*, 104 Ind. 548; and see, as to acts of county surveyor, *State v. Johnson*, 105 Id. 463; of city engineer: *Ray v. City of Jeffersonville*, 90 Id. 567; of master commissioner: *Shoults v. McPheeters*, 79 Id. 373; of referee or master in chancery: *Underwood v. McDuffee*, 15 Mich. 361. But a board of health, in removing diseased persons beyond the city limits, act ministerially, and not judicially: *Aaron v. Broiles*, 64 Tex. 316. The duties of clerks of court are in general ministerial: See *Gulick v. New*, 14 Ind. 93; *Gregory v. State*, 94 Id. 384; *Pennington v. Streight*, 54 Id. 376; *Johnson v. Commonwealth*, 80 Ky. 377; *State v. Green*, 34 La. Ann. 1027; as, for instance, in receiving and

filing the bond of a sheriff, and administering to him the oath of office: *People v. Fletcher*, 2 Scam. 482. But where it is made the duty of the clerk to approve the bonds of county officers, his approval is in the nature of a judicial act: *Swan v. Gray*, 44 Miss. 393. Officers intrusted with the registry of deeds act ministerially and not judicially: See *People v. Miner*, 37 Barb. 466; *Silver v. People*, 45 Ill. 225; so a commissioner of jurors acts ministerially in the selection of jurors: *People v. Taylor*, 45 Barb. 129; but jurors themselves are said to act judicially in judging the facts, and are not responsible for their verdicts: *Groenvelt v. Burnwell*, 12 Mod. 386; and see *Yates v. Lansing*, 5 Johns. 282, 295. A commissioner, or other officer duly authorized thereto, in taking the proof or acknowledgment of the execution of a deed, acts ministerially: *Lynch v. Livingston*, 6 N. Y. 422; and see *Remington Paper Co. v. O'Dougherty*, 81 Id. 474. So the varied duties of a sheriff are nearly all ministerial: See *People v. McClay*, 2 Neb. 7; *Powell v. Tuttle*, 3 N. Y. 396; *Gibson v. National Park Bank*, 98 Id. 87; *Pudney v. Burkhardt*, 62 Ind. 179; *Fremont v. Crippen*, 10 Cal. 211. And it was held that even when presiding over a jury of inquest a sheriff acted ministerially, and not judicially, because he had no power to give judgment: *Tillotson v. Cheetham*, 2 Johns. 63; and see *Daniels v. People*, 6 Mich. 381, 390. But a coroner acts judicially in holding an inquest, and cannot be held liable for excluding persons from a room where he is about to take an inquisition: *Garnett v. Ferrand*, 6 Barn. & Cress. 611; *Crisfield v. Perine*, 15 Hun, 200; affirmed, 81 N. Y. 622.

ACTS OF MUNICIPAL CORPORATIONS AS JUDICIAL OR MINISTERIAL.—Municipal corporations are endowed with various powers, among which are: 1. Those which are discretionary and judicial, quasi judicial, or legislative in their character; and 2. Those which are mandatory and ministerial in their character: See *Gould v. City of Topeka*, 32 Kan. 485. As illustrating these different classes of powers, it is held that the power to provide drainage or sewerage is in its nature judicial or legislative: *Mills v. City of Brooklyn*, 32 N. Y. 489; *McCarthy v. Syracuse*, 46 Id. 194; *Child v. Boston*, 4 Allen, 41; *City Council v. Gilmer*, 33 Ala. 116; *McClure v. City of Red Wing*, 28 Minn. 186, 194; *Seifert v. City of Brooklyn*, 15 Abb. N. C. 97; *Gilluly v. City of Madison*, 63 Wis. 518; S. C., 53 Am. Rep. 299; but having determined upon the construction of drains and sewers, the power to construct them and keep them in repair is ministerial: *Jones v. New Haven*, 34 Conn. 1; *City of Joliet v. Harwood*, 86 Ill. 110; S. C., 28 Am. Rep. 17; *Merrifield v. Worcester*, 110 Mass. 216; S. C., 14 Am. Rep. 592; *Ashley v. Port Huron*, 35 Mich. 296; S. C., 24 Am. Rep. 552; *Dorman v. Jacksonville*, 13 Fla. 538; *Savannah v. Waldner*, 49 Ga. 316; *Taylor v. Austin*, 32 Minn. 247; *City of Denver v. Capelli*, 4 Col. 25. In other words, in selecting and adopting the general plan of an improvement, a municipal corporation acts judicially; but in executing that plan, it acts ministerially: *Barton v. Syracuse*, 36 N. Y. 54; *Urquhart v. Ogdensburg*, 91 Id. 67; S. C., 97 Id. 238; *Piercy v. Averill*, 37 Hun, 360; *Munn v. Pittsburgh*, 40 Pa. St. 364; *Wheeler v. Worcester*, 10 Allen, 491; *McClure v. City of Red Wing*, 28 Minn. 186; *Rosell v. Anderson*, 91 Ind. 591; *Weis v. City of Madison*, 75 Id. 241, 250. If, however, there be a negligent error in the plan, resulting in a positive injury to another, the municipality cannot claim protection on the ground that the work was planned in the exercise of a power judicial in its nature: *Weis v. City of Madison*, 75 Ind. 241; *Cummins v. City of Seymour*, 79 Id. 491; *Seifert v. City of Brooklyn*, 15 Abb. N. C. 97; *Ashley v. Port Huron*, 35 Mich. 296; S. C., 24 Am. Rep. 552; and see *Rowe v. City of Portsmouth*, 56 N. H. 291; S. C., 22 Am. Rep. 464; *Wilson v. City of New Bedford*, 108 Mass. 261; *Gillison v. City*

of *Charleston*, 16 W. Va. 282; *O'Brien v. City of St. Paul*, 25 Minn. 331; S. C., 83 Am. Rep. 470; *Ross v. City of Clinton*, 46 Iowa, 606; *Vanderslice v. City of Philadelphia*, 103 Pa. St. 102; *Prideaux v. City of Mineral Point*, 43 Wis. 513; *City of Chicago v. Langlass*, 66 Ill. 361; *Clemens v. City of Auburn*, 66 N. Y. 234. Nor can a city claim protection on this ground, where an improvement, as planned, is so manifestly dangerous that a court, upon the facts, can say, as a matter of law, that it was dangerous and unsafe, and the city should generally be held liable for any resulting injuries to individuals: *Gould v. City of Topeka*, 32 Kan. 485; S. C., 49 Am. Rep. 496. The duty of a city to construct drains or sewers being in its nature judicial, the municipality may, in its discretion, abandon a drain or sewer after it has been constructed: *City Atchison v. Challiss*, 9 Kan. 603. The power to enact ordinances for municipal improvements is legislative in its nature, and cannot be delegated: *Hydes v. Joyes*, 4 Bush, 464; *State v. New Brunswick*, 32 N. J. L. 548; and see *Stockton v. Creamer*, 45 Cal. 643; *State v. Paterson*, 34 N. J. L. 163; *Richardson v. Heydenfeldt*, 46 Cal. 68. But acts involved in the necessary performance of a duty prescribed by a municipal ordinance are strictly ministerial: *Danbury etc. R. R. Co. v. Town of Norwalk*, 37 Conn. 109; and see *Leventhal v. New York*, 5 Lans. 532; *Amy v. Supervisors*, 11 Wall. 136; *People v. Supervisors*, 85 N. Y. 323; *Henry v. Taylor*, 57 Iowa, 72; *Perry v. City of Worcester*, 6 Gray, 544; *Overseers v. Overseers*, 82 Pa. St. 275; *Clark v. Miller*, 54 N. Y. 528. Officers of municipal corporations, in exercising their legislative powers generally, are entitled to the same protection as in the exercise of power judicial or quasi judicial in its nature: *Jones v. Loving*, 55 Miss. 109; S. C., 30 Am. Rep. 508; as to exemption from liability in the latter case, see *Green v. Talbot*, 36 Iowa, 409; *Walker v. Hallock*, 32 Ind. 239; *Newman v. Sylvester*, 42 Id. 106; *Borough of Freeport v. Marks*, 59 Pa. St. 253; *Waldron v. Berry*, 51 N. H. 136; *State v. Justices*, 58 Mo. 583; *Ex parte Black*, 1 Ohio St. 30; *Commonwealth v. Henry*, 49 Pa. St. 530.

SET-OFF MUST BE DEBT EXISTING IN FAVOR OF DEFENDANT when the action was commenced: See note to *Lee v. Lee*, 76 Am. Dec. 684.

LEGISLATIVE CONTROL OVER REMEDIES: See note to *Morse v. Gould*, 62 Am. Dec. 112.

DISTINCTION BETWEEN JUDICIAL AND MINISTERIAL ACTS: *Longfellow v. Quimby*, 48 Am. Dec. 525; *Hughes v. Streeter*, 76 Id. 777, 780, note.

CONTRACTS WHICH MAY BE PERFORMED WITHIN ONE YEAR are not within the statute of frauds: See note to *Lockwood v. Barnes*, 38 Am. Dec. 622.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The distinction between a judicial and a ministerial act, marked out in the principal case, was approvingly referred to in *State v. Board of Comm'rs etc.*, 45 Ind. 506; *Pennington v. Streight*, 54 Id. 377; *Shoups v. McPheeters*, 79 Id. 377. The definition of a ministerial act, given in the principal case, was quoted in *Gray v. State*, 72 Id. 578. An act is none the less ministerial because the person performing it may have to satisfy himself of certain facts before his duty can be performed: *Ray v. City of Jeffersonville*, 90 Id. 572. Legislation as to street improvement, although it makes no provision for the assessment of benefits and damages occasioned by said improvement, is constitutional: Id. 574. The manner in which the cause of a party shall be got before a judicial tribunal, so it is not an unreasonably inconvenient and embarrassed one, is with the legislative power: Id. 573. The statute of limitations cannot be evaded by bringing a second suit which is not a continuation of the first, which was timely brought: *Sidener v. Galbraith*, 63

Id. 93. As to the effect of *Sumner v. Coleman*, 20 Id. 490, on the statute of limitations, the principal case was referred to. A claim against the trustee of an express trust cannot, in an action brought by him, be set off against him because he is not the real party in interest: *Swindell v. Richey*, 41 Id. 287; *Waddle v. Harbeck*, 33 Id. 234; *Heavenridge v. Mondy*, 49 Id. 440. The reason is that the trustee has no beneficial interest in the cause of action: See two cases last cited. Where a city, organized and acting under the general law of Indiana, makes a contract for the improvement of a street at the expense of the property holders, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon the proper application against the property holders, a suit cannot be maintained by the contractor against the city for damages: *City of Greencastle v. Allen*, 43 Id. 348. But it may be remarked that the contractor has a remedy. It is by mandate to compel the engineer and council to do and perform their respective duties: Id. 348, and cases there cited. The point decided in the principal case was that the issuing of a precept for the collection of an assessment for a street improvement was a ministerial and not a judicial act: *State v. Board of Comm'rs etc.*, 45 Id. 503.

MILES v. VANHORN.

[17 INDIANA, 245.]

COMPLAINT IN SLANDER MUST AVER THAT WORDS NOT ACTIONABLE PER SE WERE USED IN CRIMINAL SENSE. The want of such averment cannot be supplied by the innuendo, for the reason that that branch of the pleading cannot aver a fact, or change the natural meaning of words.

WORD "SOREWED" DOES NOT OF ITSELF IMPORT SEXUAL INTERCOURSE, but it may, when spoken in certain localities, involve the charge of whoredom; and when it is thus used, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used.

ACTIONABLE WORDS.—The words, "She is in the family way, and I can prove by A that she has been taking camphor and opium pills to produce an abortion," when spoken of an unmarried female, are slanderous.

AMENDMENT OF PLEADINGS.—Under the Indiana statute, the court may at any time, in its discretion and on such terms as may be deemed proper, direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense: See 2 R. S., p. 48, sec. 99.

UNAUTHORIZED AMENDMENT OF PLEADINGS IN SLANDER.—An amendment, in an action for slander, which embraces an entirely new set of words, essentially different from those previously alleged, and of themselves constituting a new cause of action, is unauthorized.

EVIDENCE IN SUPPORT OF CHARACTER OF EITHER PARTY IS INADMISSIBLE, as a general rule, until there has been an attempt by evidence to impeach it.

PLAINTIFF, IN SLANDER, CANNOT INTRODUCE EVIDENCE OF GOOD CHARACTER, where the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, but has not attempted to impeach the general character of the plaintiff.

ACTION for slander. The facts are stated in the opinion.

H. S. Kelley, A. J. Neff, and Walter March, for the appellant.

D. Nation, A. Steele, and H. D. Thompson, for the appellee.

By Court, DAVISON, J. This was an action for slander, by the appellee, who was the plaintiff, against Miles. The complaint consists of two counts. The first alleges that the defendant, on, etc., at, etc., spoke and published of and concerning the plaintiff, and of and concerning her character for chastity, these false, slanderous, and defamatory words, viz.: First set of words: "There is nothing the matter with her [meaning plaintiff], only the boys [meaning certain boys in the neighborhood of the defendant] screwed her [the plaintiff meaning] too much at the spelling-school [meaning a spelling-school then lately held in the neighborhood of the defendant]; then and thereby meaning it to be understood by said words that the plaintiff had been and was guilty of whoredom, and it was so understood by Jesse Munroe and others, who heard defendant speak said words."

Second set: And also these words, as a continuation of the same conversation: "There is nothing the matter with her [meaning the plaintiff], only she [the plaintiff meaning] has screwed the boys too much at spelling-school." Then and thereby wishing it to be thought and understood that the plaintiff was and had been guilty of whoredom with said boys at said spelling-school, and it was so understood by Jesse Moore and others at the time. Third set: "Sarah Vanhorn is in the family way, and I [meaning defendant] can prove by Bob Thompson that she [plaintiff meaning] has been taking camphor and opium pills to produce an abortion." Then and thereby wishing to be understood that said plaintiff had been guilty of whoredom, and that she had had illicit intercourse with men, she being at the time an unmarried woman, and it was so understood by Robert Thompson and others, who heard him. And the plaintiff further says that she is an unmarried woman, and that the defendant spoke of and concerning her, and of and concerning her character for virtue and chastity, the false, slanderous, and defamatory words following, viz.: Fourth set: "There is nothing the matter with her [meaning plaintiff], only she [plaintiff meaning] screwed the boys too much at spelling-school; thereby intending it to be understood that she had been guilty of whoredom with certain unmarried men and boys, who had then lately attended a

spelling-school held in the neighborhood of plaintiff and defendant, and it was so understood at the time by Jesse Moore and divers others, good and worthy citizens, who heard him speak the words."

Defendant demurred severally to each set of words alleged in the complaint; but his demurrers to the first, second, and fourth sets were overruled; to the second the demurrer was sustained.

The correctness of the decisions thus made depends upon the solution of this inquiry: Does the word "screwed," as used in the first and fourth sets of words, of itself impute sexual intercourse? If it does not, then the words in these sets are not actionable; because in the complaint there is no averment that that word was used in a criminal sense; nor is the want of such averment at all supplied by the innuendo, for the reason that that branch of the pleading cannot aver a fact, or change the natural meaning of words: *Hays v. Mitchell*, 7 Blackf. 117. The definition of "screwed," as given in Webster's Dictionary, is, "Fastened with screws, pressed with screws, forced." This is no doubt the ordinary and correct import of the word. It may, however, when spoken in certain localities, involve the charge of whoredom; but when that occurs, the pleading founded upon it, as slanderous, should affirmatively allege its import at the time and place it is used. The appellee refers to *Rodebaugh v. Hollingsworth*, 6 Ind. 339; but that authority does not favor his view of the question, because there the word "screwed" was alleged in the complaint to have a provincial meaning; and that, at the time when and place where it was spoken, it meant sexual intercourse. So in *Hays v. Mitchell*, 7 Blackf. 117, the words, "You hooked my geese," were adjudged not actionable *per se*; but at the same time, it was held competent for the plaintiff, in his pleading, to have made them express a criminal charge. We are referred to *Shields v. Cunningham*, 1 Id. 86. In that case, the words, leaving out the innuendoes, were charged in this form: "Dr. Eddy made an appointment with Elizabeth Cunningham, scaled the walls, and went to bed to her at Mrs. Reperton's house." These words were held actionable *per se*; but that decision is plainly inapplicable to the case at bar; because there the words charged fairly impute sexual intercourse, while in this instance, the word in question, in its ordinary import, conveys no such imputation: *Angle v. Alexander*, 7 Bing. 119. The demurrers to the first and fourth sets of

words were doubtless well taken. We think, however, that the third set are, as alleged, clearly actionable. It follows, the demurer to that set was correctly overruled.

Defendant's answer contains two paragraphs: 1. A general traverse; 2. Justification. There was a verdict for the plaintiff, upon which the court, having refused a new trial, rendered judgment.

While the trial was in progress, and after a portion of the evidence was given to the jury, the plaintiff moved for leave to amend her complaint as follows: "And again these words, as spoken by Phoebe Miles, the defendant's wife, and at the time sanctioned by him, to wit: 'Robert Thompson has given camphor and opium pills to Isaac Vanhorn's wife, to doctor away a young one; and now he has given them to Sarah Vanhorn [meaning plaintiff], also to doctor away a young one;' and as an indorsement of the words thus spoken by his wife, the defendant said: 'It is so, for Bob [meaning said Robert] has given them to more than forty others;' thereby meaning to charge the plaintiff with whoredom and murder, and he was so understood by one John Vanhorn, who heard the words spoken.'" This motion, though resisted by the defendant, was sustained by the court, and the plaintiff was allowed so to amend her complaint. We have a statutory rule of practice which says that "the court may at any time, in its discretion, and on such terms as may be deemed proper, direct . . . any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense:" 2 R. S., sec. 99, p. 48.

The appellee, in support of the motion for leave, etc., relies on *Lister v. McNeal*, 12 Ind. 302. But that decision, it seems to us, is not in point. There, the words charged in the original complaint were: "Old Jane White caught Elzy White and the girl, Lisle Chapman [meaning the plaintiff Delilah], in the barn, at the thing itself." The circuit court allowed the plaintiff, during the trial, to insert immediately before "old," the words "George Dean said," and to strike out the name "Lisle Chapman," and this court sustained its rulings. These amendments were obviously within the discretionary power of the court; they modified, it is true, the set of words originally charged, but produced no material change in the complaint. But here, the amendment allowed embraces an entire new set of words, essentially differing from those previously alleged,

and of themselves constituting a new cause of action. Such an amendment, in our judgment, is unauthorized by the statute.

In the record, there is a bill of exceptions, which states "that the defendant, upon the trial, introduced evidence in support of his plea of justification, but gave no evidence touching the general character of the plaintiff, and having closed his testimony, the plaintiff produced one Mary Munroe, to whom she, plaintiff, propounded the question whether she, witness, was acquainted with the general character of the plaintiff." To this inquiry the defendant objected, but his objection was overruled, and the witness testified that the plaintiff's general character was good, etc. In civil cases, the general rule is that evidence in support of the character of either party is inadmissible, until there has been an attempt, by evidence, to impeach it: 1 Phil. Ev., 4th Am. ed., pp. 757-760, note 199. But it is argued that, as the evidence in the present case is not in the record, this court, in support of the ruling of the lower court, will presume that evidence tending to impeach the plaintiff's character was given by the defendant, upon his plea of justification. We are not, in this instance, inclined to indulge any such presumption. The bill of exception alleges affirmatively that no such evidence was given, and in view of that allegation, it must be so intended. But the point under discussion is settled by authority. *McCabe v. Platter*, 6 Blackf. 405, was an action by a *feme sole* for words charging her with fornication. Pleas: 1. Not guilty; 2. That the words were true. After the defendant had, in the circuit court, closed his testimony, he having given no evidence to impeach the plaintiff's character, she offered to prove her general character to be good; the defendant objected, but his objection was overruled. Held, by this court, that the evidence was inadmissible, and that the objection should have been sustained. So in *Houghtaling v. Kilderhouse*, 1 N. Y. 53, it was ruled that, "in an action for slander, where the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, it is not competent for the plaintiff in reply to such testimony to introduce evidence of his good character." See also *Cornwall v. Richardson*, 1 Ry. & M. 305; *Gough v. St. John*, 16 Wend. 646. These authorities are decisive that the evidence in question should have been rejected.

The judgment is reversed, with costs. Cause remanded, etc.

AMENDMENT CHANGING CAUSE OF ACTION NOT ALLOWED: *Stevenson v. Mudgett*, 34 Am. Dec. 155, and extended note thereto 158-162, discussing the question as to how far amendments varying or altering cause of action is allowed: *Pridgin v. Strickland*, 58 Id. 124; *Newall v. Hussey*, 36 Id. 717; *Ball v. Claffin*, 16 Id. 407; *Cassell v. Cooke*, 11 Id. 610; *Shock v. McChesney*, 2 Id. 415; neither is one which changes the whole character of the litigation: *Lloyd v. Brewster*, 27 Id. 88; or which changes the form of action: *Carpenter v. Gookin*, 21 Id. 566.

COMPLAINT IN ACTION FOR SLANDER OR LIBEL SHOULD SET OUT WHAT: See note to *State v. Goodman*, 60 Am. Dec. 134.

IT MUST BE AVERRED IN COMPLAINT FOR SLANDER OR LIBEL THAT WORDS NOT ACTIONABLE PER SE WERE USED IN CRIMINAL SENSE: *Rice v. Simmons*, 31 Am. Dec. 766; *Little v. Barlow*, 71 Id. 219.

EVIDENCE OF CHARACTER IN CIVIL ACTIONS: See extended note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 133; *Porter v. Seiler*, 62 Id. 341.

EVIDENCE OF CHARACTER IN CRIMINAL CASES: See note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 134.

EVIDENCE OF GOOD CHARACTER OF PLAINTIFF IS NOT ADMISSIBLE IN ACTION OF SLANDER until his character has been attacked by the defendant, either by plea upon the record, or by evidence at the trial: *Rhodes v. James*, 42 Am. Dec. 604; but a contrary rule is announced in *Williams v. Haig*, 45 Id. 774.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The facts in *Thompson v. Jones*, 18 Ind. 476, so far as permitting amendments to the complaint during the progress of a trial, were the same as those of the principal case, which was followed. After the jury has been sworn and evidence heard, it is too late for either party to amend by adding a new cause of action or defense, to be examined in the pending trial: *Hoot v. Spade*, 20 Id. 327; *Record v. Ketcham*, 76 Id. 485. There is an irreconcilable conflict in the decisions of the Indiana supreme court, in reference to the power and duty of the lower courts to permit amendments of the pleadings, on the trial, which change the issue or make a new issue. The cases recognizing the right to make such amendments, subject to conditions and with limitations therein stated, as well as the cases expressly denying the right to make such an amendment on the trial, are collected in *Burr v. Mendenhall*, 49 Id. 498, 499. In an action of slander, a complaint alleged that the words used had a provincial meaning in the neighborhood where they were spoken, and alleged what they meant and were understood to mean; and showing that the words, as they meant and were understood, charged that the plaintiff had been guilty of bestiality with a sow. The court held that this showed the words to be actionable: *Shigley v. Snyder*, 45 Id. 543. The absence of a *colloquium*, showing by extrinsic matter that words charged are actionable, is not supplied by an innuendo attributing to those words a meaning which renders them actionable. Words not in themselves actionable cannot be rendered so by an innuendo, without a prefatory averment of extrinsic facts which makes them slanderous: *Schurick v. Kollman*, 50 Id. 338. The principal case was summarized in *Downey v. Dillon*, 52 Id. 453, and was not considered in conflict with a case where the truth of a charge of crime was pleaded in justification, where evidence was given tending to sustain the plea, and where the plaintiff was allowed to give in evidence his general character, in the same manner as if he were on trial upon an indictment for the alleged crime. The principal case, it was said, did not involve the charge

of a crime. A complaint for slander, founded upon words having a provincial meaning, should affirmatively allege their import at the time and place where used: *Emmerson v. Marvel*, 55 Id. 270. Where character is put directly in issue, and the corrupt intent is necessary to the defense, evidence of character is admissible in criminal actions. And the principal case is not in conflict with this: *Gebhart v. Burkett*, 57 Id. 381. An innuendo cannot change the ordinary meaning of language, and if the language used is not susceptible of the meaning ascribed to it, the pleading is not aided by the statements of the innuendo: *Seller v. Jenkins*, 97 Id. 431.

ROGERS v. SMITH.

[17 INDIANA, 822.]

TWO ACTIONS WILL LIE, AS GENERAL RULE, FOR TORT COMMITTED UPON WIFE: 1. By the husband alone, for the loss of service, expenses, etc.; 2. By the husband and wife for the injury to the wife's person.

FOR INJURY TO MINOR CHILD, FATHER MAY MAINTAIN ACTION FOR LOSS OF SERVICE, EXPENSES, ETC., but the right of action for the personal injury still remains in the child.

COMPLAINT IN TORT SHOULD BE FRAMED FOR PARTICULAR CAUSE OF ACTION PARTY HAS RIGHT TO SUE FOR; but if it includes two or more causes of action, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. This is the common-law rule.

WHERE COMPLAINT IN TORT CONTAINS TWO OR MORE DISTINCT CAUSES OF ACTION IN ONE COUNT, it is duplicity under code. The remedy is by motion to strike out, and not by demurrer.

ACTION for malicious prosecution. The facts are stated in the opinion.

John Matson and J. A. Scott, for the appellant.

Williamson and Daggy, for the appellee.

By Court, PERKINS, J. Smith sued Rogers for malicious prosecution. The complaint contained three paragraphs: 1. Charging a malicious prosecution of himself; 2. Charging a malicious prosecution of his wife, whereby she was imprisoned, etc.; 3. Charging a malicious prosecution of his minor children, etc. The plaintiff recovered seventy-six dollars. The court overruled a demurrer to the second count, and that ruling raises the only question this court has to decide.

The appellant contends that as to the matter of that paragraph, the wife was a necessary party plaintiff with her husband, she being the meritorious cause of action. As to the personal injury to herself, her sufferings, etc., occasioned by the prosecution, she was the meritorious cause of action; and in a suit to recover damages on such account, it would be necessary that she should join with her husband. But as to

the loss of service of the wife, and the loss of comfort in her society, and the expenses attendant upon her defense, etc., she had no cause of action; the injury was to the husband alone; and for such cause of action the husband should sue alone. So, in relation to the minor children. For the loss of service, the father had his action; for the personal injury to the minors, severally, the action belonged to them. For torts, therefore, to wives and minor children, there are, as a general proposition, two actions: one by the husband and father, not for the injury to the person, but for his personal losses in the way of service, expenses, etc.; the other by the husband and wife for the injury to the person of the wife; and by the children severally, alone, for injury to their persons: *Long v. Morrison*, 14 Ind. 595; *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Id. 366 [74 Am. Dec. 259]; *Boyd v. Blaisdell*, 15 Id. 73.

In actions for criminal conversation, the husband must sue alone; and also in slander for words spoken of the wife, not actionable *per se*, but which occasion damage to the husband: 1 Swan's Pr. 88; *Van Vacter v. McKillip*, 7 Blackf. 578. And in these several suits, the complaint should be framed for the particular cause of action the party has a right to sue for; but where it is drawn including both the causes of action of which we have spoken, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. This is the common-law doctrine: *Richards v. Farnham*, 13 Pick. 451; *Lewis v. Babcock*, 18 Johns. 443; *Fuller v. Naugatuck Railroad Co.*, 21 Conn. 556. Under the code, the joinings of both grounds of action would be duplicity, which should be taken advantage of by motion to strike out, not by demurrer.

It may be remarked here that a husband cannot maintain a separate action for loss of services, etc., of his wife, growing out of an injury occasioned by a defective highway, in Massachusetts, because it is there held that all remedy for such injury is statutory, and the statute has given but the joint action by husband and wife: *Harwood v. City of Lowell*, 4 Cush. 310; 2 Hilliard on Torts, 586.

The judgment is affirmed, with one per cent damages, and costs.

ACTION FOR INJURY TO WIFE.—This subject is discussed in an extended note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 619-622. That two actions for damages exist where a married woman is injured—1. For the wife's personal injuries; 2. For expenses and loss of service—see note to *Bartley v. Bechtmyer*, 53 Id. 350. That both husband and wife must join in action of

tort brought to recover damages for personal injuries sustained by the wife, see *Ballard v. Russell*, 54 Id. 620; *Thomas v. Winchester*, 57 Id. 455. That action for loss of wife's services, etc., accrues to husband alone, see note to *Bartley v. Richtmyer*, 53 Id. 350.

Action for Injury to Minor Child.—This subject is extensively discussed in the note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 622. That father may sustain action for loss of his minor child's services, etc., see *Dennis v. Clark*, Id. 671; *Shields v. Yonge*, 60 Id. 698. For personal injury to minor child, or for suffering, etc., occasioned by a tort committed upon it, the child must sue by his next friend or guardian: See note to *Carey v. Berkshire R. R. Co.*, 48 Id. 624; note to *Bartley v. Richtmyer*, 53 Id. 350.

GENERAL RULE IS THAT COUNT CHARGING DISTINCT OFFENSES IS BAD FOR DUPLICITY: See extended discussion of this point in note to *Ben v. State*, 58 Am. Dec. 239, where many cases are cited. Where the same cause of action is stated in different counts, the remedy for the objection, under code pleading, is not by demurrer, but is a motion to compel the plaintiff to elect which count shall stand, and to strike out the others: See extended note to *Sturges v. Burton*, 72 Id. 589. A pleading is double when it presents two distinct grounds of defense: *Cunningham v. Smith*, 60 Id. 333.

DUPLICITY IS AVAILABLE ONLY UPON SPECIAL DEMURRER, and is not reached by a general demurrer: *Cunningham v. Smith*, 60 Am. Dec. 333, and cases cited in note thereto 335.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It was referred to in *Swinney v. Nave*, 22 Ind. 180, as one showing a proper complaint in a suit for a tortious injury to the wife. Under section 8 of the practice act of Indiana (2 R. S. 1876, p. 36), the husband had to join with the wife in an action by her against a physician for malpractice; but under the act of March 25, 1879 (Acts 1879, p. 160), she may sue alone: *Barnett v. Leonard*, 66 Id. 425. The principal case was summarized in *Hamm v. Romine*, 98 Id. 80. It was the common-law rule that when a married woman is a party, her husband must be joined with her, and this rule was embodied in the civil code of Indiana of 1852, with certain exceptions. But in the revision of 1881 (R. S. 1881, sec. 254), the provision of 1852, that married women must, in general, be joined with their husbands, was not re-enacted. The effect of this change was to leave the common-law rule in force, except that, in certain cases mentioned in the statute, the wife may sue alone, as she might have done under the act of 1852; and where she sues with her husband for an injury to her person, the rules laid down in the principal case are still in force. And if the complaint, as in that case, in addition to the personal injury to the wife, states matters of damage to the husband, in which the wife has no legal interest, and no motion is made to strike out such matters, and there is a verdict for the plaintiffs on the general denial pleaded, the presumption will be that the proof was confined to the legitimate ground of damage: Id. 80. One employing the minor child of another against the parent's will must pay to the parent the reasonable value of the child's services; and it is equally well settled that an action will lie where one wrongfully and knowingly keeps an infant child from the service of the parent: *Grand Rapids etc. R. R. Co. v. Showers*, 71 Id. 454. And the right of the mother to recover in such cases is recognized: *Pennsylvania Company v. Long*, 94 Id. 253, where several cases, besides the principal one, are cited. To enable the parent, however, to recover full damages for the services of the child during his minority, such damages must be specially declared for and demanded: *Pennsylvania Company v. Lilly*, 73 Id. 254.

WILSON v. RYBOLT.

[17 INDIANA, 391.]

TITLE DEED IS PERSONAL CHATTEL, BUT IS SO CONNECTED WITH and essential to the ownership of real estate, that it descends with it to the heir.

DELIVERY OF TITLE DEEDS, WHERE NECESSARY, WAS COMPELLED by chancery from a very early date. Later, they became recoverable in an action of detinue.

DETINUE AND REPLEVIN AT COMMON LAW DEFINED.

DETINUE FOR UNLAWFUL DETENTIONS, AND REPLEVIN FOR UNLAWFUL TAKINGS, were finally made, at common law, to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned.

DETINUE AND REPLEVIN, in their fullest scope, were formerly in use in INDIANA, but the whole ground for both these actions is now covered by the code provision for the recovery of personal property.

POSSESSION OF DEEDS IS OF LESS CONSEQUENCE IN THIS COUNTRY THAN IT FORMERLY WAS IN ENGLAND, because of our recording acts. But the legal right to them has probably not changed; and even if it has, as to prior deeds, it still remains as to the deed between the immediate grantor and grantee.

POSSESSION OF TITLE DEEDS MAY BE RECOVERED UNDER CODE ACTION FOR RECOVERY OF PERSONAL CHATTELS, and title deeds may be recovered in such action in a justice's court, as the jurisdiction of justices of the peace, within a limited sum, is, as to the character of the articles sought to be recovered, equally extensive with that of the higher courts.

APPELLATE COURT WILL, IN ABSENCE OF EVIDENCE, PRESUME IN FAVOR OF JUDGMENT BELOW, on question as to whether the evidence established a right in the plaintiff to a title deed sued for. This applies to a case where the bill of exceptions does not contain the words, "this was all the evidence given in the cause."

SUIT to recover possession of personal property. The facts are stated in the opinion.

Gavin and Coverdill, for the appellants.

Scobey and Cumback, for the appellee.

By Court, PERKINS, J. Suit before a justice of the peace to recover possession of personal property, viz., a certain title deed to a lot of ground. Judgment for the plaintiff, on appeal to the common pleas. The first question is, whether a title deed can be recovered in this form of action.

A title deed is a personal chattel; but like the log-chain of a saw-mill, or certain other fixtures, it is so connected with and essential to the ownership of real estate, that it descends with it to the heir: 2 Bla. Com. 427; *Hoskins v. Tarrence*, 5 Blackf. 417 [35 Am. Dec. 129].

From a very early period, chancery compelled the delivery of title deeds where necessary: 3 Bla. Com., Sharswood's ed..

153, note. Later they became recoverable in an action of detinue. Chitty, in his work on pleadings (vol. 1, p. 122), says detinue "lies for the recovery of charters and title deeds," etc.: See *Atkinson v. Baker*, 4 T. R. 230.

Now, what was the action of detinue? Blackstone, in his Commentaries (book 3, p. 151), thus describes its incidents: "In order, therefore, to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully into possession of the goods, as either by delivery to him or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. Upon this, the jury, if they find for the plaintiff, assess the several values of the parcels detained, and also damages for the detention; and the judgment is conditional; that the plaintiff recover the said goods or (if they cannot be had), their respective values, and also the damages for detaining them."

Such was the common-law action of detinue; and as it was an action for the recovery of personal property only, we must hold that whatever could be recovered by it was regarded, for the purposes of this civil remedy, as personal property. The action of replevin, at common law, was originally of a more limited character. It lay to recover back property illegally distrained; but it afterward came into use in all cases where personal property was illegally taken. The two actions of detinue, for unlawful detentions, and replevin for unlawful takings, thus came to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned: 1 Ch. Pl. 162, 164.

These two actions, viz., detinue and replevin, in their full-est scope, were formerly in use in this state: Ind. Dig. 46 et seq.; see Williams on Personal Property, 49. And it will be seen at a glance, by inspecting the provision in the code for the recovery of personal property, that it covers the entire ground of both actions. That provision is (sec. 128), "when any personal goods are wrongfully taken, or unlawfully detained," etc. The jurisdiction of justices of the peace, as to the character of articles of property, is equally extensive: 2 R. S., sec. 71, p. 464.

The conclusion irresistibly follows that the possession of title deeds may be recovered in the action under the code for the recovery of personal chattels. If title deeds cannot be recovered in this action, how can they be recovered at all?

The possession of deeds of conveyance of real property is of much less consequence in this country than it formerly was in England, because of our recording acts. The public records of conveyances disclose to purchasers, in most cases, the true condition of the title to real estate. In England, before registration acts were passed (and now in the portions of it where they are not in force), the possession of the complete chain of title deeds was the evidence which the seller produced of his ownership; and on a sale, the entire series of deeds passed to the purchaser, so that the seller should have no evidence of title remaining whereby he might be able to effect a second and fraudulent sale. Hence, on a purchase of land in England, we discover a valid reason why an abstract of title, accompanied by the deeds constituting the links in the chain, should be furnished: Williams on Real Property, 870 et seq.

But though the possession of deeds has become of less importance, the legal right to it is not probably changed; and even if it is as to prior deeds, it still remains as to the deed of the immediate grantor of the plaintiff.

The second question made in the case is, whether the evidence established a right in the plaintiff to the deed sued for. The bill of exceptions does not contain the words, "this was all the evidence given in the cause."

As the plaintiff recovered below, we must, in the absence of the evidence, presume in favor of the judgment.

The judgment is affirmed, with costs.

HANNA, J., filed a dissenting opinion.

PERSON PROPERLY ENTITLED TO CUSTODY OF TITLE DEEDS OF HIS ESTATE may come into equity and obtain a decree for a specific delivery of them if they be wrongfully withheld: *Snoddy v. Finch*, 70 Am. Dec. 216.

ACTION OF REPLEVIN, SCOPE OF: See note to *Dunham v. Wyckoff*, 20 Am. Dec. 697, 698; *Crocker v. Mann*, 26 Id. 684, and note 688; *Dearmon v. Blackburn*, 60 Id. 160.

JUDGMENT OF COURT BELOW WILL NOT BE DISTURBED when there is doubt as to the weight of evidence: *Graham v. Reynolds*, 65 Am. Dec. 745.

THE PRINCIPAL CASE WAS CITED in *Stephenson v. Martin*, 84 Ind. 168, to the point that where a valid and effectual conveyance had been made to a testator, the heirs, and not the executor, is entitled to possession of the deed. And if the deed was ineffectual to pass title to the land, the executor still has no right to hold it, but it would belong to the heirs, as if it were valid and effectual, as the heirs alone can bring an action professedly to quiet the title: Id. What is said in the principal case as to the scope of detinue, replevin, and action for recovery of personal property was quoted approvingly in *Hals*

v. *Applegate*, 92 Id. 575. And in the same case, page 576, in speaking of what articles may be recovered in an action of replevin, and the particularity required in describing them, the fact was alluded to, that a title deed was recovered in the principal case.

DALLAS v. SELLERS.

[17 INDIANA, 479.]

INADMISSIBLE EVIDENCE IN ACTION FOR CRIM. CON.—In such an action, defendant cannot prove facts going to show that there was no affection existing between the plaintiff and his wife at and before the time of the alleged seduction. Neither will evidence be heard that plaintiff, in witness's opinion, did not furnish his wife or family with a suitable house to live in.

SUIT for criminal conversation. The facts are stated in the opinion.

John P. Usher and D. W. Voorhees, for the appellant.

J. E. McDonald and A. L. Roache, for the appellee.

By Court, PERKINS, J. Suit for *crim. con.* Judgment for the plaintiff for seven hundred dollars.

Only two questions are made by appellant's counsel in this court, and they are upon the rejection of evidence.

The defendant brought upon the stand a witness to state that "from what he had observed, and knew of the language and conduct of the plaintiff and his wife towards each other, there was not, in his opinion, any affection existing between them at and before the time of the seduction."

Aside from the objection to the evidence as mere opinion, it would seem that evidence of facts, showing ground on which to found such an opinion, would have been inadmissible. If affection did not exist at the time, the defendant should not have interfered to cut off all chance for its growing in the future: *Van Vacter v. McKinnip*, 7 Blackf. 578.

The defendant introduced upon the stand another witness to state that, in his opinion, the plaintiff did not furnish his wife (that is, his family) with a suitable house to live in. The court refused to hear the evidence. There was no error in this. If any question could have arisen upon the quality of house the plaintiff lived in, the evidence should have been of facts, upon which the jury could have formed an opinion. It was not a question for experts.

The judgment below is affirmed, with five per cent damages, and costs.

SCOBEY v. GIBSON.

[17 INDIANA, 572.]

LAW TENDING TO DELAY COLLECTION OF DEBTS IS INOPERATIVE UPON EXISTING CONTRACTS; because it violates the federal prohibition that no state shall pass any law impairing the obligation of contracts: See Const. U. S., art. 1, sec. 10.

FOR CONVENIENCE, STATE MAY CHANGE LEGAL REMEDIES; may vary the times of holding courts, shift jurisdiction from one to another, change forms of action, of pleadings, and of process, etc.; and may incidentally delay somewhat the collection of given debts; but the legislature cannot, under guise of legislating upon the remedy intentionally, in effect, impair the obligation of contracts.

ACT DIRECTED TOWARDS REMEDY MAY IMPAIR OBLIGATION OF CONTRACTS, and such legislation does do so, where it deprives a party of a remedy substantially as efficient as that existing when the contract was made.

ACT PROVIDING FOR REDEMPTION OF REAL PROPERTY SOLD UPON EXECUTION, ETC., so far as the same is intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with the federal constitution, which prohibits the passage of any law impairing the obligation of contracts: See act of June 4, 1861; Acts Special Sess. 1861, c. 41, p. 79; Const. U. S., art. 1, sec. 10.

THE facts are stated in the opinion.

Oscar B. Hord, for the appellant.

B. W. Wilson, for the appellee.

By Court, PERKINS, J. The only question in this case is, whether the redemption law of 1861 (Acts 1861, p. 79) is to be held applicable to sales on judgments upon contracts existing at and before its passage. The act provides that in all cases of sales by the sheriff, etc., on execution, etc., after its passage, the sheriff shall not give the purchaser a deed for and possession of the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed.

In legal effect, what is the operation of this statute? It is to prohibit for one year the absolute sale of property for the purpose of collecting a debt due. In place of such sale, it authorizes the sheriff to make a contract for the absolute sale of property after the lapse of one year's time, unless such contract shall be defeated by the performance of a specified condition, namely, the return of the purchase-money paid, with interest, by the expiration of said year; it authorizes, in other words, the sheriff, in legal effect, to mortgage the debtor's land for one year to any one who will advance the amount required by law, upon its appraised value, the mortgage to become ab-

solute and free from an equity of redemption at the end of a year, if the money advanced is not repaid with interest.

What is the influence of such a statute upon the collection of debts? Its tendency is to delay. It embarrasses the collection, because it deprives the creditor of the right which the law, at the date of his contract, gave him of selling the absolute fee of the debtor's real estate.

And the question is, If held to operate upon existing contracts, will the act conflict with that clause of section 10, article 1, of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts? What constitutes such a law?

A few years ago the legislature passed a law prohibiting the sheriff to sell the debtor's property unless the half of the appraised value was bid for it. Before that time, property had sold for what it would bring. The appraisement law was held not to operate on existing contracts; and why? Not because it forbade the sale of property for their enforcement—it did not do that—but because it deprived the sheriff of the absolute power to sell the fee at all events; it left him but the conditional power to sell; the power of selling if he could get a certain price; not otherwise. It tended to embarrass, and thereby to prevent the sale, and thus delay the collection of the debt. So, too, a while ago, an additional stay of execution was given upon judgments, by an act of the legislature. This act was held inoperative as to existing contracts; and why? Not because it canceled obligations, but because it delayed their collection by the process of the law. This was the natural, necessary, and intended effect of both of the above-mentioned statutes, and it is also of the redemption law. If the decisions upon the operation of the first two named laws were right, and we are bound by them, then, beyond doubt, the redemption law in question must be held inoperative upon existing contracts: See the cases collected in 1 R. S., Gavin & Hord's ed., 10.

It is said that where a purchaser bids off the property and pays the money under the present law, he has no right to object to the redemption, as he buys in face of the law; but it is a maxim, that every man is bound to know the law, and act accordingly. Hence the man who buys does so knowing that the law will not and cannot operate to deprive him of his deed and title; and he must be taken to make his bid in the light of, and influenced by, such knowledge. And further, the law must be uniform in its operation, alike upon all.

Again, it is urged that the legislature has a right to change legal remedies; that it is only the obligation of contracts that cannot be impaired; and it is claimed that the redemption law affects the remedy only.

It is freely admitted that the state, for convenience, may change legal remedies; may vary the times of holding courts, shift jurisprudence from one to another, change forms of action, of pleadings, and of process, etc.; and that such legislation may incidentally delay somewhat the collection of given debts; but such is not the purpose of this legislation, and while its validity is admitted, it may also be asserted that the legislature cannot, under the guise of legislating upon the remedy, intentionally in effect impair the obligation of contracts; and it may be further laid down that any legislation, professedly directed to the remedy, which deprives a party of one substantially as efficient as that existing at the making of the contract, does impair the obligation of the contract: Ind. Dig., sec. 55, p. 271. In *Gantly v. Ewing*, 3 How. 707, Judge Catron, in delivering the opinion of the court, said: "This court held in *Bronson v. Kinzie*, 1 How. 319, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the state where it was made." See also 1 Blackf., by Peele & Davis, 220, note; also *Thorne v. San Francisco*, 4 Cal. 127; *Seale v. Mitchell*, 5 Id. 401; *Ives v. Kimball*, 1 Mich. 309. It may, perhaps, be questioned whether the redemption law in question is properly classed as legislation touching the remedy. It does not operate upon terms of court, upon pleading or practice in obtaining judgment, nor upon process upon judgment. But, however classed, it restricts, curtails the right of the judgment creditor, in relation to subjecting the property of the debtor to execution for the payment of given debts. It may not diminish the fund of the debtor applicable to the payment of his debts; nor did the appraisement law, nor the stay law; but it limits, curtails materially, and embarrasses the right of the creditor in given cases, in subjecting the entire amount of the debtor's property subject to execution to the payment of the debt in suit: *Curran v. Arkansas*, 15 How. 304.

This court judicially knows, and it must decide the question as one of law upon its judicial knowledge, that the right to sell at once the entire, absolute fee-simple in land, and give the purchaser possession, is worth more, will be more likely to

realize the amount of money due on a particular judgment than the restricted right of selling a conditional interest in such land; and that hence the taking away of such absolute right may tend to defeat, in given cases, the collection of debts due. A purchaser will give more for an absolute title than a conditional one; and few moneyed men will be found to buy conditional titles as mere investments, which may be defeated by simply refunding them their money, with ten per cent, when a much higher rate may be obtained on the most select securities. But suppose the act in question is to be regarded as directed to the remedy; still, as we have seen, an act thus directed may impair the obligation of contracts. It is very doubtful whether those cases decided upon the general rule of international law, that the *lex loci* governs as to the interpretation and effect to be given to the terms of a contract, and the *lex fori* as to the remedy upon it, are safe guides to rely upon in determining the force to be awarded to the constitutional provision quoted. These express constitutional restrictions upon the legislative power are peculiar to American government, and must be interpreted in accordance with the spirit and purpose of their adoption. Stay and relief laws, enacted by various states before the adoption of the federal constitution, were, in part at least, the evil which it was designed to prevent the repetition of. The learned Chancellor Desausure, of North Carolina, who lived in the times mentioned, and who went upon the equity bench in 1808, in a note to *Glaze v. Drayton*, 1 Desau. 109 (a case decided in 1784), says: "The legislature, in consideration of the distressed state of the country after the war [revolutionary war], had passed an act preventing the immediate recovery of debts, and fixing certain periods for the payment of debts far beyond the periods fixed by the contract of the parties. These interferences with private contracts became very common with most of the state legislatures, even after the distress arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community to such an extent that new troubles were apprehended, and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty and adopting an efficient national government, than these abuses of power by the state legislatures." See also, on this point, Rawle on the Constitution, and Sergeant's Constitutional Law.

We have been controlled, in coming to our conclusion, by

the decisions bearing upon the question latest made by the supreme court of the United States. We may, most safely, we think, presume that that court will follow, and not depart from, those decisions. Should such be the case, it would be detrimental to the public should this court decide the redemption laws operative upon existing contracts, thus leading debtors to suffer their lands to be sold upon the faith of a right to redeem, which the supreme court might take away. While, should this court decide against the redemption, it will put debtors on their guard to take care of their property; and should the supreme court afterward decide in favor of redemption, the decision of this court will not have worked harm to any great extent.

The judgment is reversed, with costs. Cause remanded, etc.

HANNA, J., filed a dissenting opinion.

LEGISLATIVE CONTROL OVER REMEDIES: See note to *Goshen v. Stonington*, 10 Am. Dec. 136; *Bailey v. Philadelphia, W., and B. R. R. Co.*, 44 Id. 593; *Bruce v. Schwyler*, 46 Id. 447; note to *Morse v. Gould*, 62 Id. 112; *Reapers' Bank v. Willard*, 76 Id. 755, and collected cases in note to same 760; *Coffin v. Rich*, 71 Id. 559, and note to same 567; *Von Baumbach v. Bade*, 76 Id. 283, and note 293.

OBLIGATION OF CONTRACT IS IMPAIRED BY LAWS AFFECTING REMEDIES, WHEN: See note to *Winter v. Jones*, 54 Am. Dec. 392; *Von Baumbach v. Bade*, 76 Id. 283, and numerous cases cited in note thereto 293.

RETROSPECTIVE LAWS RELATING TO REDEMPTION: See note to *Goshen v. Stonington*, 10 Am. Dec. 138.

REMEDY AFFORDED BY EXISTING LAWS enters into and forms part of obligation of contracts: *Von Baumbach v. Bade*, 76 Am. Dec. 283.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: The law as to penalties and costs, in force at the time of rendering judgment, governs; but as to the obligation of the contract, the law of its date, if to be executed where made, controls, as a general proposition: *Free v. Haworth*, 19 Ind. 404. The case of *Iglehart v. Wolf*, 20 Id. 32, involved the same point as the principal case, and the judgment in the former was reversed for the reasons given in the latter. A remedy may be altered by the legislature, if a reasonable one be left remaining: *Hopkins v. Jones*, 22 Id. 315; *Webb v. Moore*, 25 Id. 8. The point as to the unconstitutionality of the statute mentioned in the principal case was not questioned in *Berkshire v. Shultz*, 25 Id. 529, where it was held that as the mortgage there mentioned, upon foreclosure of which a sale was made, was executed after the redemption law came into force, the sale was governed by that law, notwithstanding the note was executed before the passage of the law. A decree upon a contract executed before the redemption law of 1861 went into force gave no right to redeem under that law: *Rucker v. Steelma*, 73 Id. 400. Although a state may change a remedy, and in so doing may, incidentally, delay the collection of a debt, yet the legislature cannot, under the name of legislating upon the remedy, intentionally, in effect, impair the

obligation of a contract: *Travelers Ins. Co. v. Brouse*, 83 Ind. 65. In this case, it was held that the redemption law of 1881 would not be allowed to take from the mortgagee the right to recover the rents from the judgment debtor, he having failed to redeem. The act of June 4, 1861, was the first statute of redemptions enacted in Indiana, and did not apply to "pre-existing" contracts: *Travelers Ins. Co. v. Brouse*, *supra*. A subsequent law will not be allowed to materially alter or materially and seriously affect rights existing when a contract was made, because to allow this would be to sanction a law which impairs the obligation of contracts, and this the constitution forbids: *Bryson v. McCreary*, 102 Id. 8.

STATUTE IMPAIRING OBLIGATION OF CONTRACT.—The constitution of the United States provides that no state shall pass any law impairing the obligation of contracts: Const., art. 1, sec. 10, sub. 1. The purpose of this provision is the maintenance of good faith in the stipulations of parties against any state interference: *Garrison v. City*, 21 Wall. 203; that is, when parties have entered into a contract, valid at the time by the laws of the state, it is not competent for the legislature or the courts of the state to impair the obligation of that contract: *Chicago v. Sheldon*, 9 Id. 50. The obligation of a contract is defined to be "the legal tie which imposes a necessity of doing or abstaining from a particular act, as distinguished from the imperfect obligation arising from gratitude, charity, or other moral duties, binding upon conscience, but having no legal remedy for their enforcement. This latter is the essence of the legal obligation:" *State v. Carew*, 13 Rich. 496; *Wood v. Wood*, 14 Id. 154; *Moore v. Holland*, 16 S. C. 15; and see *Sturges v. Crowninshield*, 4 Wheat. 200. In the constitutional sense, the obligation of a contract embraces the means provided by law by which it can be enforced: *Louisiana v. New Orleans*, 102 U. S. 203; *Collins v. Collins*, 79 Ky. 88; and where an act is passed which materially interferes with and impairs the legal remedy which the courts afforded before the passage of the act, for the enforcement of the contracts, such act is held to be unconstitutional: *Moore v. Holland*, 16 S. C. 15; *Edwards v. Kearney*, 96 U. S. 595; *United States v. Howard County Court*, 2 Fed. Rep. 1; *Van Hoffman v. Quincy*, 4 Wall. 535; *Wolff v. New Orleans*, 103 U. S. 358; *Ralls County Court v. United States*, 105 Id. 733. The state legislature may, however, change the form of the remedy, or otherwise modify it, as seems fit, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right: *Antoni v. Greenhow*, 107 U. S. 769; *Penniman's Case*, 103 Id. 714; *Ridgway v. First Nat. Bank*, 78 Ind. 119; *Travelers Ins. Co. v. Brouse*, 83 Id. 62; *Bryson v. McCreary*, 102 Id. 1, the last two cases citing the principal case to this point. So long as the legislature furnishes an ample remedy, it does not impair the obligation of a contract: *Ward v. Hubbard*, 62 Tex. 559. Nor does an act of the legislature giving a more efficient remedy for the enforcement of the obligation of a contract impair its obligation: *Hopkins v. Jones*, 22 Ind. 311, 315; *Webb v. Moore*, 25 Id. 4; *Pierce v. Mills*, 21 Id. 27; *Bryson v. McCreary*, 102 Id. 1; and see *James v. Stull*, 9 Barb. 482; as, for instance, an act of the legislature reducing the length of time of notice of sales of mortgaged premises for non-payment of loans: *Webb v. Moore*, 25 Id. 4. If it can be said to affect the contract in any way, it is to strengthen its obligation by expediting the remedy for its violation: Id.

REDEMPTION LAW IMPAIRING OBLIGATION OF CONTRACT.—It was claimed that the effect of the redemption law under consideration in the principal case was to delay and embarrass the collection of debts, because it deprived the creditor of the right which the law, at the date of his contract, gave him

of selling the absolute fee of the debtor's real estate, and that the statute was therefore unconstitutional. And this decision was subsequently followed where the points arising in the record of each case were substantially the same, in *Iglehart v. Wolfen*, 20 Ind. 32. So where the contract upon which a decree of foreclosure was rendered was made before the redemption law went into force, it was held that there was no right to redeem under that act: *Rucker v. Steelman*, 73 Id. 396, 400, citing the principal case. But where the mortgage, upon foreclosure of which the sale of the mortgaged premises was made, was executed after the redemption law came into force, the sale was held to be governed by that law, although the note was executed before the passage of the law: *Berkshire v. Shultz*, 25 Id. 523. It was recently held, on the authority of the principal case, that the Indiana redemption act of 1881, so far as it operates by its terms upon contracts made prior to its passage, in taking from the purchaser of lands sold on execution the right he previously had to the rents and profits during the redemption year, if there be no redemption, impairs the obligation of contracts, and is void: *Travelers Ins. Co. v. Brouse*, 83 Id. 62. And see an instance of an act providing for the redemption of real estate sold under order of court, held to be unconstitutional, as impairing the obligation of contracts: *Collins v. Collins*, 79 Ky. 88; also *Bronson v. Kinsie*, 1 How. 319. But a statute entitling the purchaser of mortgaged property at foreclosure sale, in case of redemption, to eight per cent interest upon his bid, the previous law prescribing ten per cent, was held to be applicable to cases where the mortgage had been given before the enactment of the statute, and, so construed, it did not impair the obligation of the contract between mortgagor and mortgagee: *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51. So the provision of the new constitution of California as to the taxation of mortgages (see Cal. Const., art. 13, sec. 4) is construed to apply to mortgages executed prior thereto, and the obligation of the contract is not impaired thereby: *McCoppin v. McCartney*, 60 Cal. 367; *Hay v. Hill*, 65 Id. 383. And a statute denying to final judgments thereafter rendered the incident of a lien upon real property is held not to impair the obligation of a contract made prior to the passage of the act: *Moore v. Holland*, 16 S. C. 15. But a statute, so far as it applies to mortgages with powers of sale, executed prior to its passage, which requires a greater rate of interest to be paid for redemption from sales under such powers than that required by the laws in force at the time the mortgages were executed, impairs their obligation, and is void: *Hillebert v. Porter*, 28 Minn. 496; and see *Carroll v. Rossiter*, 10 Id. 141, 174; *State v. Foley*, 30 Id. 350. And the right of a chattel mortgagee, under the clause in his mortgage, to take possession of and sell the thing mortgaged, in case he shall at any time deem himself insecure, is held to be a contract right, not to be impaired by subsequent legislation: *Boice v. Boice*, 27 Id. 371.

CASES
IN THE
SUPREME COURT
OF
IOWA.

ROBINSON v. HURLEY.

[11 IOWA, 410.]

PLEDGER HOLDING PLEDGE AS COLLATERAL SECURITY MAY, AFTER DEBT FALLS DUE, ELECT ONE OF THREE REMEDIES: 1. Proceed personally against pledgor for his debt, without sale of pledge; 2. File a bill in chancery for a judicial sale under a regular decree of foreclosure; 3. Sell the pledge without judicial process upon reasonable notice to debtor to redeem.

SALE OF PLEDGE AT MATURITY OF DEBT IS NOT REQUIRED, under instrument executed by pledgee to pledgor, simply dispensing with notice to the latter to redeem before sale.

MEASURE OF DAMAGES FOR CONVERSION OF PLEDGE BY PLEDGER is value of pledge at time of conversion.

ACTION by plaintiff to recover five hundred and fifty-four dollars and sixty-nine cents, due on a promissory note. Defendant pleaded payment and set-off founded upon the following receipt: "Received, Dubuque, August 6, 1857, of John Hurley, two orders on the treasurer of Dubuque city, both orders dated August 4, 1857. One is numbered 4,146, calling for five hundred dollars; the other is number 4,148, calling for two hundred and fifty dollars. The above orders are placed in my possession as security for a certain note, dated as above, calling for five hundred and forty-six dollars and fifty cents, ninety days after date. Should the said note not be promptly met at maturity, then I reserve the right and privilege of disposing of said city orders at private sale, and to appropriate so much of the sale of said bonds as shall fully satisfy said note, interest, and costs, and pay the balance, if any, to the said

John Hurley. Signed, J. M. Robinson." At maturity of the note, defendant made default in payment. Plaintiff did not then sell the scrip, but sold it six months afterwards for forty-five cents on the dollar. On the trial, defendant proved, against plaintiff's objection, that about the time the note matured the scrip in question was worth in the market from seventy-five to eighty cents on the dollar. Plaintiff then offered to prove that about the time he sold the scrip it was worth only about forty cents on the dollar. This evidence was ruled out by the court, and exceptions taken to both rulings. The jury found a verdict of seventy-seven dollars and fifty cents for defendant. Motion for a new trial was overruled, and the cause is appealed to this court by plaintiff.

Samuels, Allison, and Crane, for the appellants.

Wilson, Utley, and Doud, for the appellee.

By Court, LOWE, C. J. Upon the foregoing facts, the court, at the request of the defendant, gave the following instructions as the law of this case, to wit: That under the receipt offered in evidence by defendant, if the plaintiff sold the scrip at all, he was required by the terms of the receipt to sell the same at or about the time of the maturity of the note; and that if they (the jury) find from the evidence that said plaintiff had not sold the scrip, he was liable for the value of said scrip at or about the time of the maturity of the note. The court also refused to charge the jury that the value of the scrip, at the time it was sold by the plaintiff, was the measure of his liability to the defendant for the same.

If the plaintiff acted tortiously or misappropriated the scrip in disposing of it at the time he did, the above rule of damages would seem to be proper and just. But if it was his right, under the law which governs pledges, even as modified by the contract of the parties in this case, to sell these collateral securities at the time and under the circumstances which he did, then there was no misappropriation, and a different criterion of damages obtains, to wit, the value of the scrip at the time of its conversion.

That we may arrive at a better understanding of the rights, duties, and obligations of the parties under the receipt in question, let us inquire what they would be under the law in the absence of such a contract. After the debt falls due, the pledgee, under the law, has his election to pursue one of three courses: 1. To proceed personally against the pledgor for his

debt, without selling the collateral security; or 2. To file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; or 3. To sell without judicial process, upon giving reasonable notice to the debtor to redeem: 2 Kent's Com., 9th ed., 785; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303. The plaintiff, in executing said receipt, did not waive his right of adopting either of the above methods to satisfy his claim. The only change made in the rights and obligations of the parties by this instrument was simply to dispense with notice to the debtor to redeem before the creditor could sell. There is nothing in the language or terms of this receipt which obliged the plaintiff to sell these collaterals at the maturity of the note. He simply reserved the right to do so, a right which the law gave him, without such reservation, upon giving notice to redeem. A postponement of the exercise of this right is a thing of which the debtor cannot very well complain; it only enlarges his opportunity to redeem, and thereby prevent any sacrifice that might result from a forced sale of the pledge. The depreciation in this case which the scrip in question suffered, between the maturity of the note and the sale of the same, was without the fault or power of prevention on the part of the plaintiff. He was only bound to that attention and diligence in the preservation of the thing pledged which a careful man bestows upon his own property, for the reason that the arrangement or contract was reciprocally beneficial to both parties. We conclude, therefore, that the plaintiff, in selling the collateral securities at the time and under the circumstances which he did, violated no obligation or duty growing out of the understanding of the parties, or expressed by the receipt or law itself. And if we are right in this conclusion, it follows that the measure of his liability for said scrip is the value thereof at the time of conversion. This rule of damages in cases of this kind is well established: See Sedgwick on Damages, 365, 366, 480, 481, and authorities there cited.

Judgment reversed, and new trial granted.

SUBJECT OF PLEDGES, RIGHTS AND REMEDIES GENERALLY, will be found treated of in note to *Luckett v. Townsend*, 49 Am. Dec. 731.

POWER OF PLEDGE TO SELL PLEDGE IN CASE OF DEFAULT IN PAYMENT: See *Dykens v. Allen*, 42 Am. Dec. 87; *Stearns v. Marsh*, 47 Id. 248; *Whitlock v. Heard*, 48 Id. 73; *Wilson v. Little*, 51 Id. 307, and note 314.

PLEDGE'S RIGHT TO POSSESSION.—In every valid contract of pledge, the pledgee is found in possession: *Parshall v. Eggart*, 52 Barb. 367; *Seymour v.*

Golburn, 43 Wis. 67; *Combs v. Tuckelt*, 24 Minn. 423; *Collins v. Buck*, 63 Me. 459; *Cochran v. Rippey*, 13 Bush, 495; *Ceas v. Bramley*, 18 Hun, 187. It is his right to hold possession of the thing pledged to him, and if the pledgor recover possession wrongfully, without the pledgee's consent, the pledge is nevertheless valid: *Thacher v. Moore*, 134 Mass. 156; *Vischer v. Bagg*, 21 N. Y. Week Dig. 399 (N. Y. Sup. Ct.); *Bruley v. Rose*, 57 Iowa, 651. He is even entitled to retain possession against the pledgor, although the statute of limitations might be successfully pleaded to an action on the debt to secure which the pledge was made: *Roots v. Salt Co.*, 27 W. Va. 483; *Camden v. Alkire*, 24 Id. 674; *Hudson v. Wilkinson*, 61 Tex. 606. Nor can the pledgee be rightfully deprived of possession under a chattel mortgage executed after the property was pledged to him: *Deeter v. Sellers*, 102 Ind. 458. But if he gives up the possession to the pledgor, unless for a mere temporary purpose, the bailment is thereby terminated and his lien is lost: *Walker v. Staples*, 5 Allen, 34; *Kimball v. Hildreth*, 8 Id. 167; *Black v. Bogert*, 65 N. Y. 601; *Beeman v. Lawton*, 37 Me. 544; *Collins v. Buck*, 63 Id. 459; *Shaw v. Wilshire*, 65 Id. 485; *Treadwell v. Davis*, 34 Cal. 601; *Palmtag v. Doutrick*, 59 Id. 154. But the possession is sufficient if a third person holds the property for the pledgee as his agent: *Boynton v. Payrow*, 67 Me. 587; *Brown v. Warren*, 43 N. H. 430; *Weems v. Delta Moss Co.*, 33 La. Ann. 973; *McCready v. Haslock*, 3 Tenn. Ch. 13. And the possession of the pledgor will, in some cases, be deemed that of the pledgee: See *Macaulay v. Hopkins*, 35 Hun, 556. The pledgee's remedy for a wrongful taking of the property from his possession is by an action for its recovery against the wrongful taker, or against any person into whose hands the pledged property has been delivered by such wrongful taker: *Sanders v. Davis*, 13 B. Mon. 432; *Cooper v. Rey*, 47 Ill. 53; *Hutton v. Arnett*, 51 Id. 196; *Noles v. Marable*, 50 Ala. 386; *Easton v. Hodges*, 18 Fed. Rep. 677; or, if it be not delivered to the pledgee on demand, he may maintain an action for its value: *United States Express Co. v. McInta*, 72 Ill. 293; and see *Boone on Mortgages*, sec. 296.

PLEDGEES REMEDY BY SUIT ON DEBT.—Upon default in payment, the pledgee may elect to sue the pledgor for his debt, without a sale of the security: *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Jones v. Scott*, 10 Kan. 33; and he may recover a judgment in such suit against the pledgor for the amount of the debt, without destroying or in the least affecting his lien on the property pledged: *Id.*; *Ehrlich v. Ewald*, 4 West Coast Rep. 380 (Sup. Ct. Cal.); *Butterworth v. Kennedy*, 5 Bosw. 143; *Archibald v. Argall*, 53 Ill. 307; *Dorst v. Bates*, 95 Id. 493; *Smith v. Strout*, 63 Me. 205; nor is he required to return the security before bringing suit on the claim secured, without a special contract to that effect: *Taylor v. Cheever*, 6 Gray, 146; *Dorst v. Bates*, 95 Ill. 493; *Lorner v. Bain*, 14 Neb. 178; *Bank of Rutland v. Woodruff*, 34 Vt. 89; *Am. Nat. Bank v. Harrison Wire Co.*, 11 Mo. App. 446; *Sayre v. King*, 17 W. Va. 562; *Lewis v. United States*, 92 U. S. 618; *West v. Carolina Life Ins. Co.*, 31 Ark. 476. The rule is, that in the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt, without selling the pledge: *Sonoma Valley Bank v. Hill*, 59 Cal. 107; and see *Hendrix v. Harman*, 19 S. O. 483. And in an action upon the debt, a claim for the value of the pledge is not available to the pledgor as a defense by way of set-off or recoupment: *Winthrop Bank v. Jackson*, 67 Me. 570; compare *Fay v. Gray*, 124 Mass. 500. But under the practice in some of the states, damages for the conversion of the pledge will avail as a defense to such action by way of counterclaim, if properly established: *Cass v. Hig-*

botham, 100 N. Y. 248; *Scott v. Crease*, 2 S. C. 522; and see *Stearns v. Marsh*, 4 Denio, 227. And in such states it is held to be incumbent on the plaintiff in such action, either to produce the collateral security, or account satisfactorily for its non-production: *Stuart v. Bigler*, 98 Pa. St. 80; and see also *Douglass v. Mundine*, 57 Tex. 344; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474. If the pledgee attaches the property pledged, in an action upon the debt which the pledge was given to secure, this is held to be in general a waiver of his lien: *Buck v. Ingersoll*, 11 Met. 226; *Evans v. Warren*, 122 Mass. 308; and see *Sickles v. Richardson*, 23 Hun, 559; but he may attach property of the debtor other than that pledged without waiving his lien: *Taylor v. Cheever*, 6 Gray, 146. As to effect of attachment where stock has been pledged, see *Norton v. Norton*, 43 Ohio St. 509.

PLEDGE'S REMEDY BY NON-JUDICIAL SALE OF PLEDGE.—The parties to the contract of pledge may regulate in advance the remedy to which the pledgee must resort, in subjecting the property pledged to the payment of the debt: *Union Trust Co. v. Rigdon*, 93 Ill. 458; provided the agreement be not in contravention of the statute, nor against public policy, nor fraudulent: *Baker v. Drake*, 66 N. Y. 518; S. C., 23 Am. Rep. 80. But in the absence of any agreement as to the remedy to be pursued, the pledgee may, upon default, proceed to sell the chattel pledged at public auction, without judicial process, the legal requirements as to notice and the provisions of the law to secure fair dealing being duly regarded: *King v. Insurance Co.*, 58 Tex. 669; *Wilson v. Bransam*, 27 Cal. 258; *Pigot v. Cubley*, 15 Com. B., N. S., 701; *Merchants' Bank v. Thompson*, 133 Mass. 482; *White v. Phelps*, 14 Minn. 27. The power to sell is, ordinarily, incident to the pledge and a part of the security of the debt, and consequently follows the debt into whosoever hands it may come: *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254. And if the pledgor asserts the existence of an agreement as to the remedy to be pursued, it is incumbent upon him to show it: *King v. Insurance Co.*, 58 Tex. 669. But although the pledgee may, upon default, sell the thing pledged, yet it seems that he is not bound to do so, even on notice from the pledgor to sell: *Field v. Leavitt*, 5 Jones & S. 215; *Napier v. Central etc. Bank*, 68 Ga. 637.

A pledge should properly be sold at public auction, and notice to the pledgor of the time and place of sale is necessary, unless waived by agreement of parties: *Potter v. Thompson*, 10 R. I. 1; *White v. Phelps*, 14 Minn. 27; *Cole v. Dakeiel*, 13 Ill. App. 23, 26; *Morgan v. Dod*, 3 Col. 551; *Ogden v. Lathrop*, 65 N. Y. 158; *Rosenweig v. Fraser*, 82 Ind. 342; *Fitzgerald v. Blocher*, 32 Ark. 742. Reasonable notice to the pledgor to redeem is indispensable: *Brightman v. Reeves*, 21 Tex. 70; *Conyngham's Appeal*, 57 Pa. St. 474; *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254, 263. And if a previous demand of payment be necessary to put the pledgor in default, the demand must be made: *Earle v. Grant*, 14 R. I. 228. But the rule as to notice of sale and demand of payment may be waived by agreement between parties, and is held to have no application in cases where, by the contract, a definite time is fixed for the payment of the debt. In either of these cases, it is held that sale may be made without notice or demand: *Chouteau v. Allen*, 70 Mo. 290; compare *Fitzgerald v. Blocher*, 32 Ark. 742; *Hamilton v. State Bank*, 22 Iowa, 306; *Stevens v. Hurlbut Bank*, 31 Conn. 146. So notice to the pledgor of the time and place of sale is unnecessary, if he had actual notice a reasonable time before the sale was to take place: *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254; and see *City Bank v. Babcock*, 1 Holmes, 181. And defects in the sale as to notice may be cured by subsequent conduct on the part of the pledgor amounting to ratification. As where, in order to obtain

an advantageous sale, the pledge was sold privately for more than its value, and the owners of the pledge and all parties interested had actual notice, and approved the sale and participated in it, the sale was held to be valid: *Ex parte Fisher*, 20 S. C. 179; and so, where it appeared that the pledgor had by parol abandoned the pledge to the pledgee, was present at the sale of the pledge, which had been advertised at "public auction," and with full knowledge made a bid for it, and ratified the sale by drinking with the pledgee and the purchaser in celebration of the sale, and that the sale took place in a room which, though not usually open to the public, was so open when the sale occurred: *Earle v. Grant*, 14 R. I. 228; see also *Child v. Hugg*, 41 Cal. 519; *Hill v. Finigan*, 62 Id. 426.

In several of the states, sales of the property pledged are regulated by statutory provisions: See Comp. Laws Arizona 1877, secs. 3618, 3619; Cal. Civ. Code, secs. 3000-3011; Dakota Civ. Code, secs. 1771-1782; *Everett v. Buchanan*, 2 Dak. 258; Conn. Acts 1875, c. 82; Acts 1877, c. 126; Ga. Code, sec. 2140; La. Rev. Civ. Code, art. 3165; *Bank Lafayette v. Bruff*, 33 La. Ann. 624; *Chaffie v. Du Bose*, 36 Id. 257; Me. Acts 1875, c. 53; R. S. 1871, c. 35; Mass. Pub. Stats. 1882, c. 192, secs. 10-12; Mo. R. S. 1879, sec. 6469; N. H. Gen. Laws 1878, p. 333, secs. 3-8; N. J. R. S. 1877, p. 812, secs. 3-5; R. I. Pub. Stats. 1882, c. 90, sec. 4; Tenn. Acts 1879, c. 100, sec. 4; Tex. R. S. 1879, p. 499; Va. Code 1873, p. 334, sec. 44.

SALE BY PLEDGEE UNDER POWER OF SALE.—A power conferred upon the pledgee to sell the thing pledged is an authority coupled with an interest, and passes to his representatives: *Chapman v. Gale*, 32 N. H. 141. Superadding a power to sell which, without express agreement, would not exist, does not exclude the pledgee from resorting to any other mode by which he may render the security available: *Nelson v. Wellington*, 5 Duer, 178. And where the power to sell is merely given, it will be construed to be such a power as exists in respect to pledges generally, and it can be exercised only upon reasonable notice to the pledgor to redeem, and of the time and place of sale: *Goldsmith v. First M. E. Church*, 25 Minn. 202. As it respects a pledge of commercial paper as collateral security for the payment of a debt, the pledgee has no authority to sell the securities so pledged, upon default of payment, either at public or private sale, in the absence of a special power for that purpose: *Cole v. Dalziel*, 13 Ill. App. 23; *Union Trust Co. v. Rigdon*, 93 Id. 458; *Jones Iron Co. v. Scioto Fire Brick Co.*, 82 Id. 548; S. C., 25 Am. Rep. 341; *Whittaker v. Charleston Gas Co.*, 16 W. Va. 717; *Fletcher v. Dickinson*, 7 Allen, 23; *Moody v. Andrews*, 7 Jones & S. 302. It is his duty to collect the paper when it falls due, apply enough of the proceeds to pay his debt, and return the balance to the pledgor: *Zimpleman v. Feeder*, 98 Ill. 613; but he cannot sell such paper in the absence of power of sale by contract: *Id.*; but compare *Potter v. Thompson*, 10 R. I. 1, 8.

It is the general rule that the pledgee cannot, either directly or indirectly, purchase the pledge at his own sale, under a power of sale in the pledge, and if he does so, the sale will be set aside at the instance of the pledgor, without regard to the question whether the sale was beneficial to the owner or otherwise: *Stokes v. Frazier*, 72 Ill. 428; *Killian v. Hoffman*, 6 Ill. App. 200; *Richardson v. Mann*, 30 La. Ann. 1060; *Baltimore etc. Ins. Co. v. Dabrymple*, 25 Md. 242; Cal. Civ. Code, sec. 3010. But this rule may be waived by express agreement of the parties, the right of the pledgee to purchase being expressed in very plain terms: *Chouteau v. Allen*, 70 Mo. 290; *Hamilton v. Schaeck*, 16 N. Y. Week. Dig. 423. So the pledgee may acquire title under purchase at his own sale, provided such purchase is afterwards ratified by the pledgor.

Hill v. Finigan, 62 Cal. 426; *Child v. Hugg*, 41 Id. 512; *Stokes v. Frasier*, 72 Ill. 428. And the assent by the pledgor to the purchase by the pledgee may be presumed, where the facts are notorious, and no dissent is shown: *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Hamilton v. State Bank*, 22 Iowa, 306. If the pledgee improperly buys the pledge at his own sale thereof, he is not chargeable with a conversion, but only takes the title which he had before, the relation of pledgor and pledgee remaining unchanged: *Bryan v. Baldwin*, 7 Lans. 174; S. C., 52 N. Y. 232; *Canfield v. Minneapolis etc. Assoc.*, 4 McCreary, 646; S. C., 14 Fed. Rep. 801.

PLEDGEE'S REMEDY BY JUDICIAL SALE.—Formerly, at common law, a pledge could not be sold in the absence of a special agreement to the contrary, except under a judicial decree: *Lansing v. Cortelyou*, 2 Cal. Cas. 200; *Ogden v. Lathrop*, 1 Sweeny, 647. This was also the rule of the civil law: See *Hart v. Ten Eyck*, 2 Johns. Ch. 100; and is the rule in Louisiana: *Brother v. Saul*, 11 La. Ann. 223. And generally the right of a pledgee to come into equity to obtain a decree for the sale of the pledge still exists, in the absence of any special agreement on the subject, although a valid sale may be made without judicial action or decree: See *Ogden v. Lathrop*, 1 Sweeny, 643; *Sitgreaves v. Farmers' etc. Bank*, 49 Pa. St. 359; *Smith v. Coale*, 12 Phila. 177; *Briggs v. Oliver*, 68 N. Y. 336; Cal. Civ. Code, sec. 3011. And a bill in equity to direct the disposition of a pledge is said to afford a more complete remedy to the pledgee than his common-law right to sell, since he may thereby relieve himself from ulterior questions as to the propriety of his course, to which he might subject himself if he proceeded to sell without judicial process, upon reasonable notice to the debtor to redeem: *Boynnton v. Payron*, 67 Me. 587. So it may become necessary to proceed in equity to enforce a pledge, for the reason that the pledgor cannot be found so as to be served with personal notice to redeem: *Stearns v. Marsh*, 4 Denio, 227; *Indiana etc. R. R. Co. v. McKernan*, 24 Ind. 62. And in cases of pledge involving indefinite and unascertained charges and accounts, the security may be more appropriately enforced by a suit in equity and a judicial sale: *Conyngham's Appeal*, 57 Pa. St. 474; and see *Durant v. Einstein*, 35 How. Pr. 223; S. C., 5 Robt. 423. In a suit in equity to foreclose a pledge, the defendant will not be allowed, by way of defense, to contend that he gave the pledge with intent to defraud his creditors: *Chafee v. Sprague Mfg. Co.*, 14 R. I. 168.

PLEDGEE'S REMEDY UPON PLEDGE OF COMMERCIAL PAPER.—The pledgee of commercial paper, held as collateral security, cannot sell such paper, in the absence of a special power of sale in the contract: *Zimpleman v. Veeder*, 96 Ill. 613; *Union Trust Co. v. Rigdon*, 93 Id. 458. But compare *Brightman v. Reeves*, 21 Tex. 70; *Davis v. Funk*, 39 Pa. St. 243; *Potter v. Thompson*, 10 R. I. 1, 8. It is his duty to collect when the paper becomes due, and apply the proceeds to the payment of his debt: *Fletcher v. Dickinson*, 7 Allen, 23; *White v. Phelps*, 14 Minn. 27; *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 73; and he is bound to the exercise of ordinary diligence in order to make the collateral available for this purpose: *Lamberton v. Windom*, 12 Minn. 322; *Whitton v. Wright*, 34 Mich. 92; *Noland v. Olark*, 10 B. Mon. 239; *Semple Mfg. Co. v. Detweiler*, 30 Kan. 386; *Hanna v. Holton*, 78 Pa. St. 334; S. C., 21 Am. Rep. 20; *Muirhead v. Kirkpatrick*, 21 Id. 237; *McQueen's Appeal*, 104 Id. 596; S. C., 49 Am. Rep. 592; *Harper v. Second Nat. Bank*, 12 Lea, 678; *Butterton v. Roope*, 3 Id. 215; S. C., 31 Am. Rep. 633; *Colquitt v. Stultz*, 65 Ga. 305; but having used ordinary diligence to secure the fruits of the pledge for the benefit of the pledgor, in view of all the circumstances of the particular transaction, his duty has been fully discharged: *Easton v. German-American Bank*, 24 Fed.

Rep. 523 (N. Y. Cir. Ct.). He may bring suit upon the paper held by him as collateral without making a previous demand upon the pledgor: *Paime v. Furnas*, 117 Mass. 290; *White v. Phelps*, 14 Minn. 27; and the suit may be brought, although the debt secured is not at the time due: *Jones v. Hawkins*, 17 Ind. 550; but he has no right to apply the proceeds to the payment of the debt until after default in its payment: *Farwell v. Importers' etc. Nat. Bank*, 15 Jones & S. 409; S. C., 90 N. Y. 483; he must first call upon the pledgor in some way to redeem: *Id.*; *Lewis v. Varnum*, 12 Abb. Pr. 305; *Strong v. Banking Association*, 45 N. Y. 720. If the instrument pledged be indorsed, action thereon may be maintained by the pledgee in his own name: *Nelson v. Wellington*, 5 Bosw. 178; *Kinney v. Kruse*, 28 Wis. 183; *Tarbell v. Sturtevant*, 26 Vt. 513; *Loddell v. Merchants' Bank*, 33 Mich. 408; *Haydon v. Nicoletti*, 18 Nev. 290; S. C., 2 West Coast Rep. 632; if not indorsed, he may sue in the name of the payee: *Jones v. Witter*, 13 Mass. 304; and see *Whittaker v. Charleston Gas Co.*, 16 W. Va. 717; or in New York, may sue thereon in his own name: *Van Riper v. Baldwin*, 19 Hun, 344, affirmed 85 N. Y. 618. The general rule is, that a plaintiff recovering on an instrument held as collateral, not being the obligation of the pledgor, is entitled to recover the whole face value of the paper, and is only liable for the surplus over the satisfaction of the debt for which the instrument was pledged: *Hilton v. Waring*, 7 Wis. 492; *N. W. Life Ins. Co. v. G. F. Ins. Co.*, 40 Id. 446; *Tooke v. Newman*, 75 Ill. 215; *Atlas Bank v. Doyle*, 9 R. I. 76; S. C., 11 Am. Rep. 219. But as between the pledgor and pledgee, when the security pledged is the obligation of the pledgor, the pledgee can only recover his principal debt: *Jessup v. City Bank*, 14 Wis. 331. So where the collateral is in the hands of a *bona fide* holder, without notice of a good defense against his assignor, the rule is that the pledgee can recover the amount of his principal debt only: *Union Nat. Bank v. Roberts*, 45 Id. 373; *Fisher v. Fisher*, 98 Mass. 303; *Gammmon v. Hus*, 9 Ill. App. 557; *Huff v. Wagner*, 63 Barb. 215; *Haydon v. Nicoletti*, 18 Nev. 290; *Logan v. Cassell*, 88 Pa. St. 288; *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381; *Lacroix v. Derbigny*, 18 La. Ann. 27.

PLEDGE'S REMEDY UPON PLEDGE OF STOCK OR BONDS.—Where stock or bonds of a corporation, or like securities other than mercantile paper, are pledged as collateral security for a debt, and the debt is past due, the pledgee may sell the stock or bonds as the readiest mode of collection, upon giving reasonable notice to the pledgor to redeem, and of the time and place of sale: *Brown v. Ward*, 3 Duer, 660; *Wallace v. Berdell*, 24 Hun, 379; *Loud v. Burke*, 22 Gratt. 264; *Stokes v. Frazier*, 72 Ill. 428. The only way to realize on such securities is by a sale, and it is a fair presumption that the parties contemplated a sale of them, after demand and due notice, in case the debt for which they were pledged should not be punctually paid: *Morris Canal etc. Co. v. Lewis*, 12 N. J. Eq. 323; *Water Power Co. v. Brown*, 23 Kan. 676; *Casfield v. Minneapolis Agricultural etc. Assoc.*, 14 Fed. Rep. 801 (Cir. Ct. Minn.). But the security cannot be sold without notice to the pledgor to redeem, and the notice must specify the time and place of sale, which must be at public auction: *Ogden v. Lathrop*, 3 Jones & S. 73; *Gay v. Moss*, 34 Cal. 125; *Genet v. Howland*, 30 How. Pr. 360; S. C., 45 Barb. 560; *Conyngham's Appeal*, 57 Pa. St. 474; *Diller v. Brubaker*, 52 Id. 498; and see *France v. Clark*, L. R. 22 Ch. Div. 830. And a custom of brokers to sell stocks or bonds, pledged as security for a loan, at private sale, without notice to redeem, and of the intended sale, is declared to be illegal and void: *Wheeler v. Newbould*, 16 N. Y. 392; *Lawrence v. Maxwell*, 53 Id. 19. But compare *Colket v. Ellis*, 10 Phila. 375; and it was held in *Worthington v. Tormey*, 34 Md. 182, that in selling stocks

It is not obligatory upon the pledgee to give notice of the place of sale. So it was held that the sale may be private if more can be realized thereby than at public auction: *Ex parte Fisher*, 20 S. C. 179. Although stocks or bonds held in pledge as collateral security for a debt may be sold, after default in payment, yet the pledgee is not bound to sell, at least without being required by the pledgor to do so: *O'Neill v. Whigham*, 87 Pa. St. 394; *Richardson v. Insurance Co.*, 27 Gratt. 749; *Colquitt v. Stultz*, 65 Ga. 305; *Napier v. Central etc. Bank*, 68 Id. 637; *Newcome v. Davis*, 133 Mass. 343. And where it is agreed that the pledgee may sell the stock at his discretion, and without notice to the pledgor, the former is not bound to sell at the request of the latter immediately upon default. He may exercise his own judgment as to the sale of the stock, and is liable only for negligence: *Franklin Sav. Inst. v. Pretorius*, 6 Mo. App. 470.

The pledgee of stocks or bonds may, in some cases, proceed by bill in equity for a judicial sale of the securities: *Stokes v. Frasier*, 72 Ill. 428; as where a stock certificate is deposited as collateral security, without indorsement, or power of attorney authorizing a transfer, a court of equity will decree a sale of the certificate, and the application of the proceeds to the payment of the loan: *Johnson v. Dexter*, 2 McArthur, 530. And the pledgee may usually be a purchaser at a sale of the stock under a decree in equity: See *Newport Bridge Co. v. Douglas*, 12 Bush, 673, 720; *Quincy v. White*, 63 N. Y. 370; but he cannot become a purchaser at his own sale of the stock pledged: *Killian v. Hoffman*, 6 Ill. App. 200; *Kimber v. Barber*, L. R. 8 Ch. Div. 56. In California, a court of equity has the power, under special circumstances, to decree the sale of negotiable instruments held in pledge. And where the maker of the instrument resides in a remote country, or in a different state, and it is not shown that he has any property subject to seizure and sale, within the jurisdiction of the forum, there is presented such special circumstances as authorize the holder of the instrument given in pledge to resort to a court of equity for a foreclosure and sale: *Donohoe v. Gamble*, 38 Cal. 340.

MEASURE OF DAMAGES FOR CONVERSION OF PLEDGE BY PLEDGEE.—The general rule as to the measure of damages is the value of the property at the time of the conversion: *Newcomb v. Baskett*, 14 Bush, 658; *First Nat. Bank v. Boyce*, 78 Ky. 42; *Rosenowig v. Frazer*, 82 Ind. 342; *Loomis v. Stave*, 72 Ill. 623; *Belden v. Perkins*, 78 Id. 449; *Cushing v. Seymour*, 30 Minn. 301; with interest up to the time of the judgment: *Hudson v. Wilkinson*, 61 Tex. 606, 610; *Grimes v. Watkins*, 59 Id. 140; *Schoother v. Hutchins*, 1 S. W. Rep. 266 (Sup. Ct. Tex.). The measure of damages for conversion of a negotiable promissory note, held as collateral security, is the value of the note at the time, which value is *prima facie* the amount upon the face of the note, with interest according to its terms: *Hamard v. Duke*, 64 Ind. 220; compare *Cole v. Dalziel*, 13 Ill. App. 23; *Sullivan v. Sullivan*, 20 S. C. 509. If the pledgee of stock wrongfully converts it, the measure of damages for the conversion is in general the value of the stock at the time, with interest: *Frothingham v. Morse*, 45 N. H. 545; *Fowl v. Ward*, 113 Mass. 548; *Bickell v. Colton*, 41 Miss. 368; *Loomis v. Stave*, 72 Ill. 623; *Boylan v. Hugnet*, 8 Nev. 345; and compare *Mexell v. Kirkpatrick*, 33 Kan. 282; *Daggett v. Davis*, 53 Mich. 35; S. C., 51 Am. Rep. 91; and where the time of the conversion is fixed by a demand and refusal to return the stock, the measure of damages is the value of the stock at the time of such demand and refusal: *Pinkerton v. Manchester etc. R. R. Co.*, 42 N. H. 424, 463; and see *Reynolds v. Witte*, 13 S. C. 5. The rule adopted by some of the courts, however, is, that the highest market price of the stock between the time of the conversion and the trial shall constitute the measure of damages:

Markham v. Jaudon, 41 N. Y. 235; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Neiler v. Kelley*, 69 Id. 403; compare *Baker v. Drake*, 53 N. Y. 211; S. C., 13 Am. Rep. 507; *Coll v. Owens*, 90 N. Y. 368; *Page v. Fowler*, 39 Cal. 412; *Hayward v. Rogers*, 62 Id. 348.

THE PRINCIPAL CASE IS CITED as stating the correct rule as to the measure of damages for a conversion, in *City of Memphis v. Brown*, 1 Flipp. 216.

AS TO WHAT DOES OR DOES NOT AMOUNT TO CONVERSION OF STOCK pledged as collateral security, see *Union etc. Bank v. Farrington*, 13 Lea, 333; *Budd v. Multnomah St. R'y Co.*, 12 Or. 271; *McAllister v. Kuhn*, 96 U. S. 87; *Payne v. Elliott*, 54 Cal. 339.

TENDER IS HELD TO BE NECESSARY TO ENABLE PLEDGEE TO MAINTAIN TROVER against the pledgee for a conversion of securities, when the lien created by the pledge has not been otherwise discharged; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Cummock v. Inst. for Savings*, 6 Eastern Rep. 414 (Sup. Jud. Ct. Mass.); and see *Lewis v. Mott*, 36 N. Y. 395; *Cass v. Higginbotham*, 100 Id. 248; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Exch. 299; *McCalla v. Clark*, 55 Ga. 53; *Cooper v. Ray*, 47 Ill. 53; *Talty v. Freedman's Sav. and Trust Co.*, 93 U. S. 321.

VAN HORN AND CLARK v. BELL.

[11 IOWA, 465.]

ALTERATION OF MORTGAGE BY ONE MORTGAGOR, after signature of his co-mortgagor and without the latter's knowledge, by inserting in the description additional property of them both, does not annul the mortgage. It may be enforced against the altering mortgagor as a lien on all the property, and as against the other mortgagor as a lien on the property described in it before the alteration.

BURDEN OF PROOF TO SHOW THAT MORTGAGE HAS BEEN ALTERED subsequent to execution is upon the defendant, in an action to foreclose the mortgage, where its execution is not denied under oath.

MORTGAGEE IS BOUND TO EXPLAIN CIRCUMSTANCES UNDER WHICH ALTERATION WAS MADE in mortgage, where the change has apparently been made after delivery.

THE opinion states the case.

L. Chase, for the appellant.

John N. Rogers, for the appellee.

By Court, **BALDWIN, J.** This is a proceeding to foreclose a mortgage given by defendant to secure the payment of a promissory note. The mortgage purports to convey some two hundred and forty-six acres of land in Louisa county, and also lot 3 in block 2 in the town of Wapello, and to be executed by said Bell and his wife.

The justice of the peace before whom the mortgage was acknowledged by Bell and wife adds to his certificate the fol-

lowing words: "Lot No. (3) three in block (9) nine was inserted after the mortgage deed was drawn in my presence."

The defendant in his answer admits the execution of the note; admits that he executed a mortgage similar to the one annexed to plaintiff's petition, but denies that lot No. 3 in block 9 was included in the mortgage executed to plaintiffs; claims said lot as a homestead; says that he is married, and that he and his wife were living upon said lot when the mortgage was given; and that his said wife never signed or acknowledged any mortgage for the conveyance thereof, and asks that the same may be exempt from foreclosure.

To this answer, the complainants replied, admitting that said lot was the homestead of defendants, but averred that said lot was in the mortgage, by direction of defendant Bell, after his wife had signed the same, and without her concurrence.

Defendant, in a rejoinder, denies any consent given to said alteration.

The cause was submitted upon the pleadings, proofs, and exhibits, and a judgment and decree rendered for plaintiff as prayed for, exclusive of lot 3, which was decreed to be released from the operation of said mortgage.

The only error assigned is, that the decree was rendered without proof showing the defendant to be a party to the alteration of the mortgage declared upon. The position assumed by the appellant in his argument is, that the mortgage is rendered void by the alteration. This position does not seem to have been relied upon by the defendant in the court below. By his answer, he admits the execution of the mortgage, but claims that the homestead was inserted without the consent of the wife; and therefore it should be exempt.

It is not admitted by the complainants, nor is it claimed by the defendant, in the pleadings, that the alteration was made after the execution of the instrument by the defendant, John Bell, or that it was made after the delivery to the mortgagee. If it had been shown that the alteration was made after delivery, it might then have been incumbent upon the plaintiffs to explain the circumstances under which it was made. There is no evidence in the record before us, and the cause can only be determined by what is admitted by the pleadings. Now, what is the presumption in regard to when this alteration was made? The justice certifies that this lot was inserted "after the mortgage was drawn, and in his presence." If there had

been any design on the part of the mortgagee to make an alteration, fraudulent in its character, it would not have been done in this manner. It does not appear that it was made without the consent of Bell, or after it was executed or acknowledged by him, but after it was drawn. The defendant failed to deny the execution of the mortgage under oath, and until this was done, the burden of proof was upon him to show that the alteration was made without the knowledge or consent of the parties.

It is admitted by the replication that the lot was inserted without the consent of the wife; but it is claimed in the same pleading that it was done at the request of the defendant John Bell, and with his knowledge and consent. Mr. Greenleaf says that "where there are several parties to an indenture, some of whom have executed it, and in the progress of the transaction it is altered, as to those who have not signed it, without the knowledge of those who have, but yet in a part not at all affecting the latter, and then is executed by the residue, it is good as to all:" 1 Greenl. Ev., sec. 568. Apply this rule to this case. There is nothing to show but that the defendant, John Bell, consented that lot 3 should be inserted. Every presumption is that he did. The replication admits that the wife did not consent to the alteration. Then it can in no manner affect her, but should be good against John Bell. But this lot is conceded to be the homestead; consequently, the husband and wife not having joined in the mortgage, it could not be foreclosed; so that neither are in any manner affected thereby.

In conclusion, we hold that under the issue in this case the burden of proof was upon the defendant. It does not appear that any objections were made to the introduction in evidence of the altered mortgage; nor does it appear what evidence was introduced upon which the court found for plaintiffs. In the absence of any evidence, and upon the pleadings, as before stated, we think there is no error.

Judgment affirmed.

MATERIAL ALTERATION DEFINED: *Reed v. Reark*, 65 Am. Dec. 127, and note 128. Presumptions as to time of alteration in written instrument: *Dow v. Jewell*, 45 Id. 371; *Printup v. Mitchell*, 63 Id. 258.

EFFECT OF MATERIAL ALTERATION IN BILL OR NOTE: *Holland v. Hatch*, 71 Am. Dec. 363, and note 369; *Wilson v. Henderson*, 48 Id. 716; *White v. Haas*, 70 Id. 548.

BURDEN OF PROOF AS TO ALTERATION OF INSTRUMENT: *Inglish v. Brennan*, 41 Am. Dec. 96; *Simpson v. Stackhouse*, 49 Id. 554; *Dow v. Jewell*, 45 Id. 371.

ALTERATION OF INSTRUMENT BY STRANGERS: *Medlin v. Platte Co.*, 40 Am. Dec. 135; *Lee v. Alexander*, 48 Id. 412; *Waring v. Smyth*, 47 Id. 299.

EFFECT OF ALTERATION OF BOND AND MORTGAGE BY MORTGAGEE: *Waring v. Smyth*, 47 Am. Dec. 299, and see note 304.

McDONALD v. GRAY.

[11 IOWA, 508.]

ACTION MAY BE MAINTAINED IN HIS OWN NAME BY ONE DESCRIBED AS TREASURER OF UNINCORPORATED ASSOCIATION upon a subscription payable to him as such treasurer. The words describing him as treasurer should be treated as surplusage.

ERECTION OF CHURCH EDIFICE IS SUFFICIENT CONSIDERATION to authorise recovery on subscription made for the purpose of such erection.

THE opinion states the case.

Sampson and Harned, for the appellant.

Patterson and Scofield, for the appellee.

By Court, BALDWIN, J. This suit is upon a subscription signed by the defendant and others, by which they agree to pay to the plaintiff, George McDonald, treasurer of the congregation of Liberty, the several sums subscribed for the purpose of erecting a church edifice for said congregation. It appears that the congregation for which the building was proposed to be built was an unincorporated association; that it had no such legal existence as would enable it to sue or be sued.

The plaintiff, in his pleadings, claims that upon the strength of the subscriptions by defendant and others, the church was erected; and that in building the same certain debts were incurred, for which he became personally responsible.

The questions upon which the appellant claims that the court erred in its rulings arise upon certain instructions that were given and others that were refused. The instructions asked by defendant appear to have been based upon an erroneous construction of the contract or subscription signed by him. It is assumed that the agreement was to pay the association, and not the plaintiff; and that plaintiff is not the real party in interest, and could not therefore bring this suit in his own name. If this position was correct, the instructions asked might have been applicable. But we think this not a proper construction of the agreement. The defendant promised to

pay to the plaintiff, as treasurer, a specified sum for a certain purpose. The words "as treasurer," etc., the association having no corporate existence, may be regarded merely as surplusage. The subscription may also be regarded as an executory contract with plaintiff; a proposition to him to erect the church building, and a promise upon the part of the subscribers to pay their subscriptions upon a compliance by him with the conditions of the same.

The court instructed the jury that the plaintiff could recover, if, in pursuance of the terms of the subscription, he had commenced the erection of a building as contemplated, and materials had been furnished, and labor expended thereon. Also, that the subscription having been made payable to him, he could recover in his own name. We are unable to perceive the error complained of in this instruction. It appears from the pleadings and evidence that the building was erected; and the subscription was virtually an agreement to pay for such building. The plaintiff had the legal interest in the agreement, and the suit was properly brought in his name: *Farwell v. Tyler*, 5 Iowa, 540; *Fear v. Jones*, 6 Id. 170.

It is further claimed that there was no consideration for the promise made by defendant. We hold that the agreement upon its face shows a sufficient consideration. It is also averred by the plaintiff that the building was to be erected upon the land of defendant; and that it was also upon this consideration defendant agreed to pay the amount of his subscription. Upon this allegation, there was an issue, and evidence introduced, and the jury found for the plaintiff. With that finding we will not interfere.

Nor do we consider that the plaintiff was required to make a demand of the defendant before the bringing of this action. Such demand, however, was alleged in the pleadings, and evidence introduced tending to show that it was made. Upon this point, also, the finding of the jury was for the plaintiff; and we see no reason to justify us in disturbing the verdict.

Judgment affirmed.

ACTIONS UPON SUBSCRIPTIONS, GENERALLY: See *Machias Hotel Co. v. Coyle*, 58 Am. Dec. 712, note 714; *Phipps v. Jones*, 59 Id. 708, note 713; *Chambers v. Calhoun*, 55 Id. 583.

SUIT ON CONTRACT OF SUBSCRIPTION FOR BUILDING STATE-HOUSE IN NAME OF STATE TREASURER: *State Treasurer v. Cross*, 31 Am. Dec. 626.

SUBSCRIPTION REQUIRES CONSIDERATION FOR ITS SUPPORT: *Galt's Ex'r v. Swain*, 60 Am. Dec. 311.

SUBSCRIPTION TO ERECT CHURCH BUILDING MAY BE ASSIGNED IN PAYMENT THEREFOR, and the contractor to whom assigned may maintain action therefor in his own name: *Hopkins v. Upshur*, 70 Am. Dec. 375.

UNDER CONTRACT OF SUBSCRIPTION TO ERECT CHURCH, reciting that "we agree to pay the sum set opposite our respective names," the consideration for each subscription was held to be the other subscriptions: *Petty v. Christ Church*, 95 Ind. 278; and see *Higert v. Trustees etc.*, 53 Id. 326; *Northw. Conf. v. Myers*, 36 Id. 375. Borrowing of money by a church corporation to pay its existing indebtedness, in reliance upon a subscription to repay the borrowed money, is a sufficient consideration to support the contract of subscription: *Trustees etc. v. Garvey*, 53 Ill. 401; *United Pres. Church v. Baird*, 60 Iowa, 237.

CONGREGATIONAL SOCIETY v. FLEMING.

[11 IOWA, 552.]

REPLEVIN WILL LIE FOR RECOVERY OF ARTICLE TORTIOUSLY SEVERED FROM REALTY, which but for such severance would be real property.

ARTICLE TORTIOUSLY SEVERED FROM REALTY DOES NOT BECOME LIABLE TO EXECUTION if it was before exempt.

WHETHER ARTICLE IS OR IS NOT FIXTURE MUST OFTEN BE DETERMINED from knowledge of the purpose designed in its erection or connection.

CHURCH BELL DOES NOT CEASE TO BE FIXTURE, and become subject to levy of execution as personal property, by being removed from belfry in old church edifice and placed in a temporary framework on the church lot, and there used for church purposes, with the intention on the part of the authorities of the society to place it permanently in the tower of a new church edifice in process of erection.

REPLEVIN for property claimed by plaintiff to be exempt from execution. Defendant levied upon a bell and clapper, and took them into his possession. The bell had been used in the belfry of the old church of the society. This building was sold, reserving the bell. A new church building was erected with a tower for the bell, and the bell, with the framework, was removed from the old to the new building. This framework was placed upon the society's lot, where the new church was erected and just in front, where it remained for about a year, the bell being used in this condition at all times when required for church purposes. Defendant, marshal of Dubuque city, having an execution, made a memorandum thereon of his levy, and notified one of the trustees thereof, but did not take the bell into his actual possession. Two weeks afterwards, and after he had advertised the property for sale, the church authorities raised the bell into the tower designed for its reception. Before it was fully fixed in its place, defendant took actual possession thereof and was about to remove it from the

premises, when it was replevied. The bell was left in the frame, and was only intended to remain there until the belfry was completed. Upon these facts, under the court's instructions, the jury found for plaintiff, and defendant appeals.

Samuels, Allison, and Crane, for the appellant.

Poor, Adams, and Cram, for the appellee.

By Court, WRIGHT, J. When a party has, by his own tortious act, severed an article from the realty, which but for such severance would be real property, replevin will lie for its recovery. Such act, however, will not have the effect of making the property liable to execution, if it was before exempt. The only question in this case then is, whether the property in controversy was, at the time of the seizure by defendant, exempt from execution. And it is admitted that it was so exempt, if it was so attached as to constitute and become a part of the realty.

The general rule is as stated by appellant and found in *Ames & Ferrard on Fixtures*, 3, "that to constitute a fixture in its strict sense, there must be a substantial and permanent annexation to the freehold itself, or to something connected with the freehold." And exceptions contravening the spirit and policy of this rule should not be favored. The character of the article, that is, whether it is a fixture or personal property, must, however, very often be determined from a knowledge of the purpose designed in its erection or connection. As is said in *Snedeker v. Warring*, 12 N. Y. 170, the connection of the article "with the land is looked at principally for the purpose of ascertaining whether the intent was that it should retain its original chattel character, or whether it was designed to make it a permanent accession to the land." Thus, while a bell, belonging to a religious society, if left upon the ground or placed in the building, without use, might in no sense be so far of the realty as to be exempt from execution as a part thereof, yet if placed in a frame on the church lot and used, it would be exempt, though the posts of the frame were not let into the ground. The placing it in this position and this use, indicate unmistakably the intention of the society to affix it to the realty, to render it a permanent accession to the land; to appropriate it to the purpose designed, and to divest it of its original chattel character. And though it be admitted that the mere intent to thus convert it without some act would not

be sufficient, yet the act and use indicate the intention, and have the effect of changing the character.

In our opinion, the verdict was warranted by the testimony, and there was no error in overruling the motion for a new trial.

FIXTURE WRONGFULLY DETACHED FROM FREEHOLD BECOMES PERSONAL PROPERTY OF OWNER OF REALTY, and he may, in general, maintain trover or replevin therefor: *Harlan v. Harlan*, 53 Am. Dec. 612.

REPLEVIN FOR PROPERTY HELD BY OFFICER UNDER EXECUTION: See *Spring v. Bourland*, 54 Am. Dec. 243, and note 245; *Dodd v. McCrane*, 46 Id. 301; *Richardson v. Reed*, 64 Id. 77, and note 80. Replevin is authorized, under Iowa code, for recovery of possession of personal property taken by legal process from the owner, when such property is exempt from seizure by such process: *Wilson v. Stripe*, 61 Id. 138.

FIXTURES DESTROYED: *Teaff v. Hewitt*, 59 Am. Dec. 634; *Bishop v. Bishop*, 62 Id. 68, and note 69. What constitutes fixture: *Mackie v. Smith*, 52 Id. 615, and note 617; *Richardson v. Copeland*, 66 Id. 424.

FRAGMENTS OF BUILDING BLOWN DOWN BY STORM OF WIND WILL CONTINUE TO BE REGARDED AS REALTY, as between a judgment creditor and assignees of the owner for the benefit of his creditors: *Rogers v. Gilling*, 72 Am. Dec. 694, and see note 697.

JESSUP v. BRIDGE.

[11 IOWA, 572.]

MORTGAGE ON FUTURE NET EARNINGS OF RAILROAD COMPANY for the purpose of securing prompt payment of interest on its construction bonds is valid.

DEFENDANTS obtained judgment against the D. & P. R. R. Company, and issued an execution and garnished the treasurer, freight agent, and conductor of the company. Plaintiffs enjoined this execution. Motion to dissolve the injunction was overruled, and defendants appeal. Additional facts are stated in the opinion.

Bissell, Mills, and Shiras, for the appellants.

James M. McKinlay, for the appellees.

By Court, LOWE, C. J. The motion to dissolve was based upon the want of equity in the bill, which presents in substance the following facts, in addition to those above stated: That the net earnings of the said road are mortgaged to them, as trustees, to secure the payment of certain bonds, two million dollars of which had been sold for the purpose of constructing said road, all dated the first of April, 1857, with interest pay-

able semiannually, a great part of which was due and unpaid; that a large quantity of land granted by congress to aid in the construction of said road was included in said deed of trust; that the earnings of said road were required to operate the same, and that the surplus belonged to the trustees, to be used by them in paying the interest on said bonds; that to intercept the earnings of the road in the hands of the agents, would, in effect, suspend the operation of the road; that no money came to the hands of the parties garnished, except that arising from the earnings of the road which in fact was mortgaged to plaintiff's trustees as aforesaid.

A copy of the mortgage or deed of trust is filed with the bill and sustained its allegations.

Some points are made and discussed which do not arise out of the facts in the bill. We are limited in our adjudication to the single question whether the bill possesses sufficient equity to authorize the injunction. This depends upon the validity of the mortgage, which is assailed mainly on two grounds: 1. Because it undertakes to convey and secure to the plaintiffs, as trustees, the future net receipts or earnings of the road, after paying taxes running expenses, etc., for a specified purpose, that of paying the semiannual interest on the construction bonds; 2. Because these receipts of earnings are in the nature of personal property, left in the possession of the mortgagor with the power of use and disbursement; and on that account furnish an implication of fraud, whereby the mortgage is rendered void as to intervening creditors and third persons. This last question we have settled against the appellants at this term of the court, in the case of *Torbert v. Hayden*, 11 Iowa, 435.

In regard to the first question, it will be noted that the plaintiffs claim that they are mortgagees in trust for certain holders of bonds issued by the D. & P. R. R. Company; that the conveyance to them is in due form, executed agreeably to an authority conferred upon the company by chapter 182 of the session laws of 1857, by the terms of which the mortgage was to bind and be a valid lien upon all the property mentioned in said deed. "Among other things, it is agreed by and between the parties to said instrument that after the said road and branch shall have been completed and in operation, the said party of the first part shall, after paying out of the gross earnings thereof the necessary expenses of operating the same and keeping said road and equipments in repair, and the necessary

expenses of said company, and all taxes imposed by the state of Iowa, pay over quarterly to said plaintiffs the whole of the remainder of the gross earnings to be by them appropriated to the payment of the semiannual interest on the said construction bonds," etc.

The validity of the provision of the mortgage is denied upon the ground that it pledges for specified purposes the gross earnings of the road not *in esse* at the time of the execution of the mortgage, which it is claimed cannot be done in law. This objection is based upon the authority of decisions made to the effect that a party cannot mortgage property of which he is not possessed, and to which he has no title at the time. There is, however, another class of authorities relating to ships at sea, and railroad companies, founded upon public policy and the due encouragement of the enterprise of the country, which hold the doctrine that the future earnings of vessels and railroad companies, as well as property subsequently acquired, might be pledged for a lawful purpose: *In re Ship Warre*, 8 Price, 269; *Wellesley v. Wellesley*, 4 Myl. & C. 560; *Metcalf v. Archbishop of York*, 6 Sim. 224; *Langton v. Horton*, 1 Hare, 556; *Pierce v. Emery*, 32 N. H. 484; *Willink v. Morris Canal and Banking Co.*, 4 N. J. Eq. 377; *Phillips v. Winslow*, 18 B. Mon. 431-445, 448 [68 Am. Dec. 729]; *Coe v. Pennock*, 6 Am. Law Reg. 27; *Ludlow v. Hurd*, Id. 493.

As a matter of fact, it is very well known that railroads are built with capital. To obtain this, companies are compelled to conform to the laws and customs which regulate its use. They are dependent, in a great measure, upon the negotiation of their bonds for means to carry forward their enterprises. These bonds can only be negotiated by indemnifying, as best they can, the creditors for the principal debt, and securing the periodical payment of the accruing interest. For this purpose, as a means to an end, it becomes essential frequently for the company to mortgage all their property and franchises, and even future earnings, after paying the necessary operating expenses.

When this has been done in good faith, to permit a third person by means of legal process to intercept these earnings in the hands of the servants of the company would result in all probability, not only in suspending the construction of such improvements, but prove destructive of the ends for which such roads were built. Railroads are shaping anew and changing the social and business relations of the whole coun-

try. The courts cannot ignore the necessity these improvements, nor will they allow a mere technical rule to stand in the way of a public demand, especially when they can make an adjudication that will subserve the purposes of justice, of public policy, and carry out the intentions of the contracting parties.

But we prefer to leave the affirmance of this case upon the reasoning that will be found in the above-cited cases, in some of which this question is very ably discussed.

Affirmed.

VALIDITY OF MORTGAGES OF AFTER-ACQUIRED PROPERTY, GENERALLY: See *Moody v. Wright*, 46 Am. Dec. 706, and note 712; *Gregg v. Sanford*, 76 Id. 719, and note 723, containing a very full collection of the cases on the subject.

EQUITABLE DOCTRINES APPLICABLE TO MORTGAGES OF AFTER-ACQUIRED CHATTELS: *Gregg v. Sanford*, 76 Am. Dec. 731, note.

THE PRINCIPAL CASE IS CITED IN *Dunham v. Isett*, 15 Iowa, 292, as recognizing the right of a railroad company to mortgage its future net earnings to secure the prompt payment of interest accruing on its construction bonds.

WHERE CHARTER OF RAILROAD COMPANY AUTHORIZES COMPANY TO BORROW MONEY, etc., and to execute "such securities, in amount and kind," as it may deem expedient, it may mortgage its entire road, with its franchises and all its property, including all future acquisitions, for the use of its road: *Pierce v. Milwaukee and St. Paul R. R. Co.*, 24 Wis. 551; and see *Branch v. Jessup*, 106 U. S. 468; *Philadelphia etc. Co. v. Woolper*, 64 Pa. St. 366; 8 C., 3 Am. Rep. 596.

KELLY v. GILLESPIE.

[12 Iowa, 55.]

APPARENT CO-MAKER OF NOTE MAY SHOW BY PAROL THAT HE WAS ONLY SURETY, and that this fact was known to the payee.

EXTENSION OF TIME FOR PAYMENT OF NOTE releases co-maker who was known to the payee to have signed as a surety merely.

NOTE USURIOUS IN ITS CHARACTER IS SUFFICIENT CONSIDERATION TO SUSTAIN CONTRACT TO EXTEND TIME of payment on another promissory note, as the party contracting for the same cannot set up the usury, and claim that there was no consideration.

ACTION against Males and Gillespie on a joint and several promissory note. Gillespie answered that he joined in the execution of the note as the surety of Males, and that the payee, at the time of execution, knew this fact; that the payee, without his consent, extended the time of payment on the note five months, in consideration of a note for the sum of seventy-five dollars and twenty-five cents, executed to him by

Males; that when the agreement was executed, and when the note became due, Males was solvent, but that he had since become insolvent. Plaintiff demurred to this answer. The demurrer was sustained, and judgment was rendered for plaintiff. The defendant appealed.

Timothy Brown and Thomas Wilson, for the appellant.

Boardman and Henderson, for the appellee.

By Court, WRIGHT, J. If two persons sign a promissory note jointly, or jointly and severally, it is competent for one of them to show, in an action at law brought thereon, that he was surety for the other, and this he may do by evidence *aliunde*, it being shown that the payee knew the fact: *Carpenter v. King*, 9 Met. 511 [43 Am. Dec. 405], and cases there cited; 2 Am. Lead Cas. 295; *Harris v. Brooks*, 21 Pick. 195 [32 Am. Dec. 254]; *Bank of Steubenville v. Hoge*, 6 Ohio, 17.

When the creditor in such a case, for a valuable consideration, suspends his right of action against the principal debtor, and gives further time for the payment of the note, without the consent of the surety, pending which the principal becomes insolvent and entirely unable to pay the debt, such agreement is a good defense for the surety in an action against him on the note: See the same authorities, and others there cited.

If the consideration thus paid is an additional note of the principal, forming a contract usurious in its nature, such usury does not make the contract a nullity, as the party contracting for the same cannot set up the usury and claim that his agreement to give time was without consideration: *Willard's Eq.* 109.

Following these rules, it is held that the facts stated in defendant's plea were a good defense to plaintiff's action, and the demurrer should have been overruled.

Reversed.

EXTRINSIC EVIDENCE IS ADMISSIBLE TO SHOW THAT APPARENT LIABILITY ON NOTE IS NOT REAL LIABILITY: *Lewis v. Harvey*, 59 Am. Dec. 286, and note 292, where it is said that an apparent maker of a promissory note may show by extrinsic evidence that he signed only as surety, and that this was known to the party suing on the note: See *Yates v. Donaldson*, 61 Id. 283.

SURETY IS DISCHARGED BY GIVING TIME TO PRINCIPAL: See *Yates v. Donaldson*, 61 Am. Dec. 283, and collected cases in note to same 294.

USURIOUS CONTRACTS IN EXTENDING TIME OF PAYMENT OF DEBT AFTER ITS MATURITY: *Gibson v. Newton's Ex'rs*, 1 Am. Dec. 559; *Chadbourn v. Watts*, 6 Id. 100; *Swartwout v. Payne*, 10 Id. 228; *Motte v. Dorrell*, Id. 675;

Bruin v. Lowry, 46 Id. 545; note to *Gower v. Carter*, 66 Id. 76. These cases refer particularly to notes. See also *Shirley v. Welty*, 71 Id. 244.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: An enlargement of credit beyond the time specified in the note, under a contract founded upon a good consideration between the creditor and the principal, without the consent of the surety, has the effect to discharge such surety; and the surety may set up such defense at law, and show by extrinsic evidence, if it does not otherwise appear on the face of the note, that he was, in fact, merely surety: *Coriell v. Allen*, 13 Iowa, 291; *Chambers v. Cochran*, 18 Id. 165; *Bonney v. Bonney*, 29 Id. 451; *Preston v. Gould*, 64 Id. 48; *Lawman v. Nichols*, 15 Id. 164; *Christner v. Brown*, 16 Id. 132; *Piper v. Newcomer*, 25 Id. 221. The three cases last cited show that one who is nominally a joint maker of a promissory note may show by evidence *alimunde* that he is in fact but a surety. Where a motion for a new trial is founded, among other things, upon the giving of certain instructions, some of which are in conflict with law, it should be sustained: *Coriell v. Allen*, 13 Id. 292.

HAYS v. HORINE.

[12 IOWA, 61.]

VENDOR'S LIEN IS NOT EXTINGUISHED by a judgment of a county court allowing and ordering the payment of a claim against an estate.

PART PAYMENT DOES NOT EXTINGUISH VENDOR'S LIEN. It still remains a security for the balance unpaid.

WHERE LIEN ONCE EXISTED, IT STILL CONTINUES, unless intentionally displaced, or waived by consent of the parties.

BURDEN OF SHOWING WAIVER OF VENDOR'S LIEN IS ON PURCHASER.

A STATEMENT of the facts is presented in the opinion.

Smith and Cassiday, for the appellant.

SeEVERS, for the appellee.

By Court, WRIGHT, J. Petition asking a vendor's lien. Defendant answers that the notes referred to were made by the intestate, Bailey; that since his death, Horine had been appointed his administrator; that the notes had been presented to and allowed by the administrator, which allowance was approved by the county court, and judgment rendered thereon in favor of the plaintiff; and that a large sum of money had been paid thereon, whereby the lien of the plaintiff, as a vendor, was waived. To this part of the answer, there was a demurrer, which was overruled.

The demurrer should have been sustained. The action of the county court was not a judgment in such a sense as to deprive the plaintiff of his right to ask a vendor's lien: *Feteaux v. Lepage*, 6 Iowa, 123; *Voorhees v. Eubank*, Id. 274.

Neither the allowance of the claim nor the receipt of a portion of the amount due, by the plaintiff, had the effect of waiving the lien given in equity and by the code to the plaintiff as a vendor. When the lien once exists (and its existence is not denied in this case), unless intentionally displaced, or waived by the consent of parties, it still continues. And the burden of proof in this respect is on the purchaser: 2 Story's Eq. Jur., sec. 1224. If, under all the circumstances, the debt remains, the lien continues. An intentional displacement is far from being shown by anything set up in this answer. Nor is there any consent shown waiving the lien: *Grubb v. Crane*, 4 Scam. 153; *Dyer v. Martin*, Id. 151; *McArthur v. Porter*, 1 Ohio, 99.

Reversed.

THE PRINCIPAL CASE WAS CITED in *Smith v. Shawan*, 37 Iowa, 534, to the point that the order of the county court allowing, approving, and ordering the payment of a claim against an estate is not a judgment in such a sense as to deprive the plaintiff of his right to a vendor's lien.

STATE v. CROSS.

[12 Iowa, 66.]

CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESS WILL BE REFUSED where want of legal diligence in procuring his attendance, or in taking his deposition, is shown. Thus a failure to make use of the statutory means to procure his attendance, or to secure his deposition, where he is out of the state, and on account of his promise to return in time to give his testimony, will not warrant a continuance.

NEW TRIAL, WHEN VERDICT IS AGAINST WEIGHT OF EVIDENCE, will be granted in a criminal action; and in the consideration of the evidence greater latitude is allowed than in civil cases: See *State v. Tomlinson*, 11 Iowa, 401.

WHERE DEFENDANT OBJECTS TO SECOND VERDICT FINDING HIM GUILTY OF SOME OFFENSE, the appellate court will, in reviewing the judgment of the court below upon the evidence, give much weight to the fact that twenty-three jurors had, on a former trial, found him guilty of the same offense, though the verdict in the first trial was set aside because the court was satisfied that it was not the free and unbiased conclusion of one of the jurors.

DEFENDANT CHARGED WITH COMMISSION OF RAPE MAY BE CONVICTED OF ASSAULT WITH INTENT TO COMMIT RAPE upon evidence showing that he intended to gratify his passions upon the person of the female, notwithstanding any resistance on her part, and that the offense was consummated under circumstances satisfying the jury that the assault was made without her consent. And the jury may do this where they are not satisfied that the resistance on her part was so continued and persistent as to prove guilt of the higher crime, when he succeeds in having carnal knowledge.

FEMALE'S FAILURE TO MAKE ANY OUTCRY when a violation of her person is attempted, and the fact that her garments do not get injured in the struggle with her assailant, as well as the fact that she keeps the injury silent for several days, tend strongly to show consent, but are not conclusive, and should always be considered in connection with her age and intelligence.

DIFFERENCE BETWEEN CONSENT AND SUBMISSION IN RAPE CASES.—Consent involves submission; but a mere submission by no means necessarily involves consent, as where a child is in the power of a strong man

RAPE. The defendant was tried and convicted of "an assault with intent to commit a rape." He obtained a new trial, but was again tried and convicted for the same offense, and appealed.

Richman and Brother, and Cloud and Van Horne, for the appellant.

C. C. Nourse, attorney-general, for the state.

By Court, WRIGHT, J. 1. It is first claimed that the court erred in overruling defendant's motion for a continuance. This was based upon the absence of a witness, by whom, he states in his affidavit, he expects to prove certain material facts. The ground upon which it was doubtlessly overruled, and as we think properly, was that it failed to show diligence in procuring the attendance of the witness. The substance of the affidavit in this respect is, that witness was a resident of Muscatine county, in this state; that he was present at a previous term of the court when the cause was set for trial, but not tried; that he had gone to Ohio, and when leaving, promised defendant to return in time to give his testimony. He also states that in consequence of this promise, he had failed to take his deposition, either before or since his departure.

It was the duty of the defendant to avail himself of the means given him by the statute to procure the attendance of the witness, or to obtain his deposition. If he failed to do this, and relied upon his promise to be present, he must abide the consequences. For the failure to attend under such circumstances, he was not entitled to a continuance. This was not legal diligence: *Day v. Gelston*, 22 Ill. 102.

2. The only other error assigned is, that the court erred in overruling the motion for a new trial, based upon the ground that the verdict was contrary to the law and evidence.

No exceptions are taken to the instructions. These are exceedingly full, and certainly state the law as correctly and favorably for the defendant as he could ask. But it is insisted

that, under these instructions, the verdict was not warranted by the evidence. It is all in the record. We have examined it with the utmost care, and are constrained to conclude that there was not such error in overruling this motion as to justify our interference. Under what circumstances this court will reverse the ruling of the court below, in overruling such a motion, in a criminal cause, was discussed in *State v. Tomlinson*, 11 Iowa, 401, and we need not recapitulate what is there said. The law governing the liability of a prisoner thus charged is also there stated; and while we see no reason for objecting to a single principle there enunciated, we still think this case should be affirmed.

It will be observed that the defendant objects to a second verdict finding him guilty of the same offense. It is true that the first was set aside, because the court was satisfied that it was not the free and unbiased conclusion of one of the jurors.

And giving to the defendant all benefit resulting from this fact, it still appears that at least twenty-three jurors, under their solemn oaths, have found him guilty of this offense. This consideration has much weight with us in sustaining the ruling below: *Jourdan v. Reed*, 1 Iowa, 135.

Then again, though charged with the commission of the crime of rape, defendant was found guilty of an assault with intent to commit that offense. And while, if he had been convicted of the higher offense, we might have inclined to the opinion that the testimony was not sufficient, we easily arrive at a different conclusion when the jury have only found the assault with intent, etc. Of course, if there was consent on the part of the prosecutrix, there could be no such violence in legal contemplation as to render the prisoner guilty, for if the liberties were taken with her consent, there could be no rape, nor yet an assault with that intent. But where the assault is made by the prisoner with the intent to commit the offense, and this is clearly shown, the jury might convict, though not satisfied that at the time he consummated his purpose, there was such want of consent as to constitute the higher crime. It is true that the jury must be satisfied before they could convict for the assault, that the prisoner intended to gratify his passions on the person of the prosecutrix, at all events, and notwithstanding any resistance on her part, and yet this might be done, though they were not satisfied that the resistance on her part was so continued and persistent, as to prove guilt of the higher crime, when he succeeds in having carnal knowledge.

In this case, the prosecutrix was but fifteen years of age. The defendant was a married man of the age of thirty-five. They were comparative strangers, or at least, the evidence tends to show that there had been no previous intimacy, and that they had seldom been in each other's company. On the day of the occurrence, she was alone in her father's house, and no one in hearing distance. The prisoner came into the house, and after talking a short time, forcibly pushed her into a small bedroom. And while the testimony is not very clear on this point, yet we think the jury were justified in concluding that he fastened the door, and then passed to the front entrance to see if any person was coming; that during this time she tried to escape from the window, and also to open the door; that he returned, threw her upon the bed, and against her will accomplished his purpose. Under such circumstances, we cannot say that the jury were not justified in this conviction.

It is not to be denied that the fact that she made no violent outcry, and the further one that she made no complaint of the injury for several days, are circumstances strongly in favor of the assumption of the prisoner's innocence. And while the absence of such outcries and complaints tend strongly to rebut the hypothesis of guilt, they are by no means conclusive. Her credibility is to be left to the jury, and these and other circumstances are to be left to their consideration. And the same is true, as to the fact that her garments were not torn, and bore no evidence of injury. If nothing of this kind appears, the jury should, from the peculiar character of the case, hesitate long before conviction. The virtuous female, who has in fact been thus injured, will not ordinarily omit to make known by her cries the threatened crime; will not be overcome without more or less injury to her garments; will not suffer in silence, and without, as soon as practicable, making known this greatest of wrongs to her person. And yet the jury may conclude, under some circumstances, that she speaks the truth, and that the crime was committed, though all these circumstances be wanting.

The age of the prosecutrix is always important to be considered in such cases. It is held that if under twelve years of age (by our statute 10, sec. 4204), she is incapable of consent. If she is very young, though over this age, and of mind not enlightened on the question, this consideration will lead the jury to demand a less clear opposition than if she were older and more intelligent: 2 Bish. Crim. L. 939. And indeed,

says the learned author, "they may convict under such circumstances when there was no opposition at all." And then again, there is a wide difference between consent and submission. Consent involves submission, but a mere submission by no means necessarily involves consent. For it might be admitted, in most cases, that the submission of an adult female to such an outrage necessarily proved consent. The mere submission of a child, however, in the power of a strong man, can by no means be taken to be such consent as to justify the prisoner in point of law: *Regina v. Banks*, 8 Car. & P. 574; *Regina v. Doy*, 9 Id. 722.

In this case, differing from that of *State v. Tomlinson*, 11 Iowa, 401, the prosecutrix is a mere child, was in the hands of a strong man, and may have been overcome by fear and submitted without consenting. This the jury may have found, and we are by no means prepared to say they were not justified in so doing. Then his conduct in placing her in the room, with the other circumstances disclosed, show his purpose and intention so unmistakably that we conclude that the verdict was fairly justified, and the case is therefore affirmed.

CONTINUANCE ON ACCOUNT OF ABSENCE OF MATERIAL WITNESS, where no diligence is used to procure his attendance or to secure his deposition: *Thompson v. Miss. M. & F. Ins. Co.*, 22 Am. Dec. 129; *Hensley's Adm'rs v. Lytle*, 55 Id. 741, and cases cited in note 743; *Wall v. State*, 70 Id. 302. These cases show that under such circumstances a continuance will not be granted. This subject is discussed at length in the note to *Stevenson v. Sherwood*, 74 Id. 144, and a cloud of cases there cited, shows that due diligence is required to procure the attendance or testimony of an absent witness, or a motion for a continuance because of absent and material witness will be denied. But it is a matter of right where a want of diligence cannot be imputed, and there is no cause to suspect that the application is for delay: *Hyde v. State*, 67 Id. 630.

NEW TRIAL BECAUSE VERDICT IS AGAINST EVIDENCE, WILL BE GRANTED WHEN: *Newson v. Lycan*, 20 Am. Dec. 156; *Kinne v. Kinne*, 21 Id. 732; *Luchette v. Townsend*, 49 Id. 723; *Googins v. Gilmore*, 71 Id. 472.

PROOF OF RAPE WILL SUSTAIN INDICTMENT FOR ATTEMPT TO COMMIT RAPE: *Lewis v. State*, 68 Am. Dec. 113.

CIRCUMSTANCES, IN RAPE CASES, THROWING DOUBT UPON ASSUMPTION THAT THERE WAS REAL ABSENCE OF ASSENT ARE ADMISSIBLE for defendant. Thus he may show that there was no immediate disclosure or no outcry, though help was known to be at hand: *People v. Benson*, 65 Am. Dec. 506.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: A court cannot act arbitrarily, nor in violation of the manifest rights of the parties to a suit in application for a continuance, yet much must necessarily be left to the sound legal discretion of the judge hearing the same: *State v. Rorabacher*, 19 Iowa, 157. A person may be indicted for

rape, and if the conviction for that offense is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape: *State v. Atherton*, 50 Id. 192. So in *State v. McLaughlin*, 44 Id. 87, it is held that where the assault is clearly shown, with intent to commit rape, the jury may convict of the assault, though not satisfied that at the time he accomplished his purpose there was such want of consent as to constitute the higher crime. On the trial of an indictment for an assault with intent to commit a rape, the assault must have been made with the intent to commit a rape at all events, even if the prosecutrix exerted every effort in her power to prevent it; and an instruction which evidently means that before there can be a verdict of guilty the jury must be satisfied that "the prisoner intended to gratify his passions on the person of the prosecutrix at all events, and notwithstanding any resistance on her part," is proper, and should be given: *State v. Hagerman*, 47 Id. 151. A less clear opposition is demanded in rape cases of an imbecile, or girl of young and tender years, than if she were older and more intelligent. The jury may find submission, but this does not necessarily imply consent, or that the act was not against her will: *State v. Tarr*, 28 Id. 402, a case in which the ravished girl was one of weak intellect. Where the jury are of the opinion that the girl was incapable of giving or of exercising any judgment over the matter, and they are satisfied that the prisoner had carnal knowledge of her by force and without her consent, they ought to find the defendant guilty: Id. 406.

MONROE v. WEST.

[12 IOWA, 112.]

IN IOWA, STATUTE ALLOWS MECHANIC'S LIEN "AGAINST ALL PERSONS EXCEPT INCUMBRANCERS by judgment rendered, and by instrument recorded before the commencement of the work or the furnishing of the material:" See Code 1851, sec. 981.

LIEN OF MECHANIC OR MATERIAL-MAN DATES FROM COMMENCEMENT OF WORK, or the furnishing of material under his contract, and attaches for all the work done and material furnished under such contract, whether before or after liens subsequently acquired by third persons. For the purposes of his lien, the contract is an entirety.

"OWNER," IN IOWA STATUTE RELATIVE TO MECHANIC'S LIENS, INCLUDES any person who has "an estate or interest" in the land, and the lien extends to the whole of his "estate or interest:" See Code 1851, sec. 981, 982.

MECHANIC CANNOT ENFORCE HIS LIEN UNDER CONTRACT MADE WITH ONE HAVING NO TITLE or interest in the land, or with one having mere possession, but no right to or in the realty.

PERSON HAS "INTEREST" IN LAND, where he holds a bond for a deed, under which he has entered into possession and exercised acts of ownership.

MECHANIC OR MATERIAL-MAN MAY ENFORCE HIS LIEN AGAINST PROPERTY for work done or material furnished under a contract with one who holds a bond for a deed to real estate. The subsequent procurement of the full legal title will not affect the lien; in fact, when materials furnished have

improved property, after such title is acquired there is all the stronger reason to uphold the lien.

MISTAKE IN JUDGMENT AS TO DATE WHEN MECHANIC'S LIEN ATTACHED MAY BE CORRECTED by proper proceedings, where it does not properly interfere with rights to which others, claiming a prior lien, were entitled; as such mistake, if corrected, does not waive any priority to which the plaintiff was entitled, when the judgment was originally rendered.

A STATEMENT of the facts is presented in the opinions.

Samuels, Allison, and Crane, for the appellant.

Bissell, Mills, and Shiras, for the appellees.

By Court, **WRIGHT, J.** The plaintiffs, as mortgagees, claim to have prior liens upon certain property of the defendant West. The co-defendants of West (Knapp, Stout, & Co.) claim that they have precedence by virtue of materials furnished by them for the erection of a house thereon. To determine which has priority, it is only material to settle some legal questions discussed by counsel.

1. And first, when does the lien of the mechanic or material-man attach under our statute? The language of the statute is (sec. 981, Code of 1851), that the mechanic has a lien "against all persons except incumbrancers by judgment rendered, and by instrument recorded before the commencement of the work or the furnishing of the material." There is no difficulty in construing this language. Those who claim priority over the mechanic or material-man must rely upon a judgment rendered or instrument recorded, before the work is commenced or the material furnished. The mechanic's lien dates from the day that he commences work under his contract, or furnishes material, and attaches for all the work done and material furnished under such contract, whether before or after liens subsequently acquired by third persons, provided the work or delivery was commenced before. The mechanic, of course, relies upon a contract, and must show it in order to entitle him to a lien. Whatever he may do under such contract dates, as to his lien, from the day he commences work, and not from date of the performance of the several parts of his undertaking. For this purpose, the contract is an entirety.

The case referred to, *McCullough v. Caldwell*, 8 Ark. 231, is not in point. The Arkansas statute, under which that decision was made, is very different from ours. So far from providing, by implication even, that the lien should attach from

the commencement of the work, their statute left it entirely indefinite when it did attach; but the court, Johnson, C. J., delivering the opinion, not without some doubt and difficulty, finally concluded that the legislature only intended to secure a lien from the time of the completion of the work. The statute of Ohio, 1843, sec. 7, p. 68, was far from being as explicit as ours in this respect; and yet it was there held that the lien dated from the commencement of the labor, and that in this respect material-men and laborers stood alike: *Choteau v. Thompson*, 2 Ohio St. 114.

2. At the time Knapp, Stout, & Co. made the contract and commenced furnishing the lumber thereunder, the title to the real estate was in the Dubuque Harbor Company. West had a bond for a deed, and had entered into possession and commenced the erection of the house. Subsequent to this time, and after the delivery of the lumber had commenced, West obtained a title, and gave to the company, on the same day, a mortgage on the same property, to secure the balance of the purchase-money. On the same day, West made a mortgage to Nelson Monroe, to secure money then borrowed. About one month after this, he executed another mortgage to Alonzo Monroe. The material-men continued to furnish lumber under their contract after as well as before these mortgages were executed. The mortgagees knew at the time of taking their mortgages that Knapp, Stout, & Co. were furnishing material and claimed a mechanic's lien, and Knapp, Stout, & Co. had knowledge of the mortgages at the time they were made. They were filed for record on the day of their respective dates. Appellants (N. and A. Monroe) now claim that West had no such interest in the property at the time of making the contract with Knapp, Stout, & Co., and at the time they commenced furnishing the lumber, as that a lien could attach in favor of said Knapp, Stout, & Co.

The language of the statute is, that the contract must be made with the "owner," and this word "includes any person who has an estate or interest in the land, and the lien extends to the whole of his estate or interest:" Secs. 981, 982. It has been held that where the contract was made with a person having no title or interest in the land, the mechanic could not enforce his lien: *Redman v. Williamson*, 2 Iowa, 488. And mere possession, without right or interest to or in the realty, is not sufficient: *Reed v. Houston*, 12 Id. 35. But these are very different cases from that now before us. To say that West had

not an interest within the meaning of our statute would be subversive of the policy of the act, and to some extent at least render it useless. And when applied to the circumstances of this case, such a construction would be inequitable and unjust. For when appellants took their mortgages, they had full knowledge that the material-men were furnishing lumber under a prior contract, the fulfillment of which they had commenced, and that they claimed a lien. Not only so, but these materials were put into the house erected on the premises, after as well as before the mortgages were given, and thus enhanced the value of the mortgaged premises.

To sustain their position, however, appellants refer us to some authorities based upon the Massachusetts statute. The leading case relied upon is that of *Thaxter v. Williams*, 14 Pick. 49. In that case, the person with whom the mechanics contracted held a covenant to convey; he afterwards received a deed, and at the same time mortgaged the premises to a third person, who advanced the purchase-money; and it was held that as the seisin of the covenantee was instantaneous, no lien attached upon the land in favor of the mechanic. For several reasons, this case is not decisive of the question before us. In the first place, as to the mortgage of Alonzo Monroe, it is not applicable, for West had title for more than a month before he thus incumbered. In the next place, while Nelson Monroe refused to loan West money until he procured his deed, and while the Dubuque Harbor Company released the property from their lien for a portion of the purchase-money, at the instance of said Monroe, yet he did not advance any portion of such money, and he was not entitled to any equitable lien or precedence therefor from that consideration. Not only so, but the Massachusetts statute uses the words "proprietor" and "owner," without any definition as to what these include. And then, when that statute proceeds further, and declares that the lien shall not only be upon the land, but that it shall give the right to redeem, where the same has been previously conveyed by mortgage, it clearly contemplates a different estate or title from that provided for by our law.

The case of *Howard v. Veazie*, 3 Gray, 233, was decided under a still different statute, which provides that the contract shall be in writing, signed by a person who is the owner and in fee-simple or some other estate less than the fee. It nowhere appeared that the person against whose land the lien

was claimed had, at the time of the contract, an estate or interest of any description in the same.

Holbrook v. Finny, 4 Mass. 566, only recognizes the doctrine that if A conveys to B, who at the same time gives a mortgage on the same premises to A to secure the purchase-money, the seisin of B is not sufficient to entitle his wife to dower in the land. And in *Chickering v. Lovejoy*, 13 Id. 51, the case turned upon the question whether the seisin of the attachment debtor was or was not so instantaneous as to exempt or render liable the land to such process in favor of his creditors.

These cases, in view of their facts as well as the statutes upon which they were based, are not applicable to the case at bar. That a person holding a bond for a deed, under which he enters into possession, and exercises acts of ownership, has an interest thereto, within the meaning of our law, we entertain no doubt. It will be observed that the word "owner" includes an "estate or interest." By the use of the word "interest," it was manifestly the intention to give the lien, though there might not be an "estate" in the technical sense. The Ohio statute uses the word "owner" alone, and it is there held that this includes not only the fee, but also the owner of a leasehold estate: *Dutro v. Wilson*, 4 Ohio St. 101; *Choteau v. Thompson*, 2 Id. 114.

This interest being sufficient at the time of the contract, and at the time the materials were furnished, the subsequent procurement of the full legal title would not affect the lien.

3. It seems that Knapp, Stout, & Co. obtained a judgment for the lumber furnished, recognizing their lien. They subsequently, by application to the court, on petition and notice to West, obtained a correction of this judgment, so as to make it appear that the lien attached at a date prior to that previously shown. Appellants now contend that Knapp, Stout, & Co. were estopped by the record as it first stood, and that this correction cannot have the effect of giving them a precedence to which they were not before entitled. If the lien of appellants attached after the first judgment, before its correction, and in ignorance of the claim of Knapp, Stout, & Co., then their position would have weight. It attached before, however, and this proceeding, as we understand it, was but the correction of a mistake which, in no proper sense, can be said to interfere with any right to which appellants were entitled: *Hurley v. Dubuque Gas Light Company*, 8 Iowa, 274.

Affirmed.

LIEN OF MECHANIC FOR WORK DONE OR MATERIALS FURNISHED, ATTACHED WHEN. *Hunter v. Blanchard*, 68 Am. Dec. 547, and note 549; *Green v. Green*, ante, p. 428; *Rogers v. Phillips*, 47 Id. 727.

"OWNER," WHO IS: See extended note to *Loonie v. Hogan*, 61 Am. Dec. 688-700, on who has such ownership in or relation to property that he can bind it by mechanic's lien.

ESTATES AND INTERESTS AFFECTED BY MECHANICS' LIENS: *Lyon v. McGuffey*, 45 Am. Dec. 675, and extensive note thereto 678-680; *Loonie v. Hogan*, 61 Id. 683, and cases cited in note to same 688.

MISTAKES IN JUDGMENT, WHEN MAY BE AMENDED: *Smith v. Hood*, 64 Am. Dec. 692; *Freedman on Judgments*, sec. 500 a.

EX PARTE GRACE.

[12 IOWA, 208.]

IMPRISONMENT OF DEBTOR, in a manner or under circumstances not fully warranted by section 19 of article 1 of the constitution of 1857, cannot be authorized by statute: See Rev. of 1860, c. 126.

NO COURT OR JUDGE CAN, UPON HABEAS CORPUS, REVIEW JUDGMENT of court of competent jurisdiction finding a creditor guilty of fraud in not surrendering his property for the payment of his debts.

"**DUE PROCESS OF LAW**" IS RIGHT OF TRIAL ACCORDING to the process and proceedings of the common law, or law in its regular course of administration through courts of justice.

RIGHT OF TRIAL BY JURY IS SECURED IN ACTIONS AT LAW, and the legislature cannot, by an evasion of the constitution, make that a proceeding to punish for contempt, which is, in its essence, a suit at law.

COURTS HAVE POWER TO PUNISH FOR CONTEMPT without giving jury trial to party charged.

DISOBEDIENCE OF ORDER MADE WITHOUT JURISDICTION IS NOT CONTEMPT OF COURT, in legal contemplation, though the court or judge making such order style disobedience of it a contempt.

LEGALITY OF IMPRISONMENT RESULTING FROM DISOBEDIENCE OF ORDERS, merely erroneous or irregular, cannot be inquired into under the writ of *habeas corpus*.

WHERE DEBTOR KEPT MONEY IN HIS POSSESSION AND REFUSED TO APPLY IT TOWARDS SATISFYING JUDGMENT against him, though ordered by a county judge to do so, it was held not a contempt under the Iowa statute. The county judge, sitting as a judge, and not as a court, had no power to hear witnesses, to examine testimony upon the issues made, to adjudge whether the party was guilty or innocent as charged, and to order him imprisoned if he failed to comply with his finding. Imprisonment under such a proceeding deprives the party of his constitutional right not to "be deprived of life, liberty, or property without due process of law," and "to a speedy and public trial by an impartial jury." Nor did it make any difference that the party examined did not demand a jury, for the judge had no power to impanel one, and a party is not presumed to waive that which there was no power to grant, if asked.

ONE PURPOSE OF PROCEEDINGS UNDER CHAPTER 126, IOWA REVISION OF 1860, is to obtain an order for the payment of the debt; and not alone to
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settle the right of the creditor to the application of the proceeds of a certain fund.

APPEAL from discharge on *habeas corpus*. Noxon recovered judgment against Grace, the petitioner. The execution issued thereon was returned unsatisfied, and he obtained an order from the county judge of Scott county to compel the debtor to appear for examination, under chapter 126 of the revision of 1860. The county judge found upon examination that the debtor had money in his possession, which he refused to deliver up; to be applied towards the satisfaction of the judgment, though ordered to do so. For his persistent refusal, the judge directed him to be imprisoned until he complied with the order. Grace sued out a *habeas corpus* before the Hon. John F. Dillon, alleging an illegal detention by the jailer of the county. The writ issued, and Grace was discharged. From the judgment of discharge, Ackley, the jailer, and the district prosecutor, on behalf of the state, appealed.

Campbell and Bills, for the appellants.

Grant and Smith, for the appellee.

By Court, **WRIGHT, J.** Several questions, unimportant in their bearing and consequences to the main and essential one, have been discussed by counsel, which we do not deem it necessary to determine. Thus it is urged by appellants that petitioner should not have been allowed to amend his petition; that there was error in the admission of certain testimony on the hearing of the *habeas corpus*, and that under this writ the district judge had no power to review the action of the county judge. To all these, and other comparatively minor matters, the petitioner responds by inquiring by what right Ackley (the jailer), or the district prosecutor, have a standing in this court as appellants. As an answer to any of these questions would leave undetermined those of vital practical importance discussed by counsel, and which they seem to concede should have an early decision in this state, we pass at once to their consideration.

Chapter 126 of the revision, so far as it bears upon the questions involved, is in substance as follows: "If an execution is issued upon a judgment, and returned unsatisfied in whole or in part, the owner of the judgment may obtain an order for the appearance and examination of the debtor. The like order may be obtained at any time after the issuing of an execution, upon proof, by affidavit or otherwise, that the debtor

has property which he unjustly refuses to apply towards the satisfaction of the judgment. This order may be obtained, among other officers, from the judge of the county court. On his appearance, the debtor may be interrogated in relation to any fact calculated to show the amount of his property, the disposition he has made of it, or any other matter pertaining to the purpose for which the examination may be made. Witnesses may be produced and examined in the same manner as upon the trial of an issue. If property subject to execution is thus ascertained, an execution may be issued and it be levied upon accordingly. The judge may order any property of the debtor not exempt, in the hands of himself or others, to be delivered up, or in any other mode applied to the payment of the judgment. Should the debtor fail to appear, after being personally served, or fail to make full answer to all proper interrogatories, he will be guilty of a contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person disobey any order of the court or judge duly served, he may be punished as for a contempt.

It was for a disobedience of an order to pay over money found to be in his pocket that petitioner was ordered to be punished as for a contempt. He claims that this law is repugnant to sections 9, 10, and 19 of article 1 of the constitution, and void. These sections are: "9. The right of trial by jury shall remain inviolate; but the general assembly may authorize a trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property without due process of law." "10. In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury," etc. "19. No person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud," etc.

It will be observed that chapter 126 is a substitute for chapter 111 of the old code, and that in many of their features they are alike. Two important differences, however, may be noticed. The one is giving the power to the examining officer or court to order any property of the debtor in the hands of himself or others to be delivered up and applied to the satisfaction of the judgment. The other, that which gives the power to punish as for a contempt any person who shall disobey any order of the court or judge in the premises.

So again, the new constitution differs from the old, by adding to section 9 the words: "But no person shall be deprived of life, liberty, or property without due process of law." And to section 10: "And in cases involving the life or liberty of an individual." Section 19 is the same in both instruments.

If this case turned alone upon the ground that the act was repugnant to section 19, we should not be inclined to give much weight to the argument. That is to say, we are not of the opinion that this chapter provides for the imprisonment of the debtor in a manner or under circumstances not fully warranted by the constitution. The failure of the debtor to surrender his property, liable to execution, to the payment of the judgment, might well be such fraud, as that within the meaning of the constitution, he would forfeit his right to claim exemption from imprisonment. Not only so, but if the fraud was once found by a competent tribunal, the correctness of that finding could not be reviewed in another court, or by any judge, upon *habeas corpus*.

When the act is measured by the other provisions of the constitution, however, there is more doubt and difficulty. This doubt arises in view of those provisions which give the right to a trial by a jury in all cases "involving the life or liberty of an individual," and which declare that no one shall be deprived of his liberty without due process of law.

It is claimed by counsel that the change in section 10, of the bill of rights, was only intended to meet the case of a fugitive slave. Whatever may have been the primary motive of some or all of the members of the constitutional convention in incorporating this provision, we can certainly see no reason in the nature of things, nor in the language employed, to justify the conclusion that white men were not also entitled to the benefit of it. We cannot believe that it was intended to give the right of trial by jury to the occasional fugitive slave found in our state, and to withhold it in cases of equal magnitude and vital importance from the half-million of free white inhabitants of the state.

Again, it is suggested that this right applies to suits at law. This is true, but the legislature cannot, by an evasion of the constitution, make that a proceeding to punish for a contempt, which in its essence is a suit at law. That is to say, if the party is secured by the constitution a jury trial in all cases involving his liberty; and if he is guaranteed due process of law before he can be deprived of this liberty; and it be true

at the same time that these provisions have reference to suits at law—it would by no means follow that these safeguards could be frittered away and broken down by styling every proceeding to punish for a disobedience of the order of a court or judge, a proceeding to punish for contempt or something else, instead of a suit, an action, a trial. If by “due process of law,” in the language of Brown, J., in *Taylor v. Porter*, 4 Hill, 140 [40 Am. Dec. 274], is meant no less “than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property,” then the legislature cannot, under the guise of punishing a party for a contempt, provide for condemning without hearing, for rendering judgment without inquiry, nor without such hearing and inquiry as he should have by due process of law. Another exposition of the phrase “due process of law” is the right of trial according to the process and proceedings of the common law, or law in its regular course of administration through courts of justice: 4 Kent’s Com., 9th ed., 621; 3 Story on Constitution, 264, 661. And would it be claimed, under this definition, that by an investigation, provided for by statute, unusual and unheard of at common law, or in the known and regular course of the administration of the law through courts of justice, that the citizen, if imprisoned thereunder, was deprived of his liberty by due process of law?

We have no thought that it was the intention of the constitution to take from courts the power to punish for contempt, without giving to the party charged a jury trial. Or at least, notwithstanding the broad and sweeping language used, we will not believe, without an array of authorities and weight of argument not yet brought to our attention, that it was designed to thus virtually take from every court a power so essential to its efficiency and very existence, and no less necessary for the safety and benefit of the public—the protection of every citizen in his life, liberty, and property. It is a preservative power, inherent in every court, and is to be exercised by the tribunal itself, and not by another for it. And this power extends to the enforcement of every order which the court may in the legitimate exercise of its authority make. But not, of course, to the enforcement of an order which it had no authority, by reason of want of jurisdiction, or otherwise, to make. For the second order being predicated upon the first, both, of course, must fall together. If, however, the order disobeyed

was erroneous merely, and not void, then the legality of the consequent imprisonment could not be inquired into by a proceeding of this nature. This view retains in every court the power to enforce its mandates, whenever legitimately made, without involving the necessity, as urged by appellants, of submitting the question of their correctness to a jury. Thus if a deed is ordered to be executed, the obligation of the party to do this has been ascertained in the regular course of the administration of justice. So of a willful disturbance of, and open interference with, the proceedings of the court in its presence, the same being of such a character as that the judge takes immediate and personal cognizance of, in the same way and manner that he would of the violation of a criminal statute in his presence. So, assuming that upon a judgment recovered for the fraud of the party, he might be taken under a *ca. sa.*, there would be no infringement of his constitutional rights if imprisonment should follow, for by "due course of law" the fraud has been adjudicated. But suppose the alleged fraud arises after judgment, and because of some claimed failure of the debtor to act honestly and according to his legal duty, is it competent for a county judge (not as a court) to hear witnesses, examine testimony upon the issue or issues made (sec. 3379), adjudge whether the party is guilty or innocent as charged, and order him imprisoned if he fails to comply with his finding? We are constrained to hold not. If this can be done, then it seems to us that it would be just as competent to provide for the examination of a party and his subsequent imprisonment, if he failed to pay any judgment rendered against him. If this can be permitted, then we do not see how far the legislature might not go in providing for the trial of issues without a jury, their determination, and for the imprisonment of the party who failed to comply with the finding. And it can make no difference that the party examined did not demand a jury, for the county judge, before whom, as judge, the examination was had, had no power to impanel a jury, and a party is not presumed to waive that which there was no power to grant, if asked.

Nor, are we inclined to give weight to the argument that the basis of the proceeding, to wit, the judgment is a verity, cannot be gainsaid, and that this proceeding is to settle the right of the judgment creditor to the application of the proceeds of a certain fund, or of the fund itself, and not to be to obtain an order that the debtor pay the debt. However it may be in

individual cases, as a rule it will be found true that the debtor is charged with fraudulently secreting his property. If not this, some other question or questions of fact will be raised just as vital to the security of the debtor's property, or it may be, involving just as clearly his liberty, as though made before trial and judgment. Take one feature in this case as an illustration. The petitioner claimed, when he appeared before the county judge, that the money, whatever he had, was exempt, being his earnings for his personal services within ninety days preceding the levy or notice to him. Now, the fact that this claim, in this case, was entirely untrue does not change the principle, for he had a right to present such an issue, and to have it tried, and that by the tribunal guaranteed him by the constitution. And until issues of this character are determined, how is it to be determined that the creditor is entitled to the application? And if the county judge has jurisdiction to try such issues, then what power may he not exercise? Having no jurisdiction, he had no power to make the order, and though the disobedience of it was styled a contempt, it was not such in legal contemplation. For there can be no legal disobedience when there was no power to make the order contemned.

In this connection, we are referred by counsel to *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 254. The length of this opinion forbids that we should do more than say that the two cases are not alike in principle, and that even in that case the judges intimate a doubt whether the order could be enforced by imprisonment. Constitutional difficulties, such as meet us in this state, are not discussed, and do not seem to have been in the way. And the same may be said of *Spear v. Wardell*, 1 N. Y. 144, which, though a lengthy case, and well reasoned by able judges, is in no respect in conflict with the views above expressed. The questions made are by no means similar. And the same remark applies to *Steward v. Biddlecum*, 2 Id. 103. *Saylor v. Mockbie*, 9 Iowa, 209, was a proceeding in chancery by one partner against the other to settle their accounts, and throws no light whatever upon the case at bar.

And indeed, we feel warranted in saying that if any authority is found sustaining the proceeding, it will be under a constitution containing no such provisions as those relied upon by the petitioner in this case.

Affirmed.

STATUTE ALLOWING IMPRISONMENT FOR DEBT, where the debtor "unjustly and unlawfully" refuses to apply property under his control to the payment

of his debts, is not in conflict with that clause of the constitution allowing imprisonment for debt only "in cases of fraud:" *Ex parte Clark*, 45 Am. Dec. 394.

COURT CANNOT GO BEHIND JUDGMENT ON HABEAS CORPUS to inquire into the lawfulness of the imprisonment of a debtor taken in execution, if the court rendering judgment had jurisdiction of the subject-matter and of the person, however erroneous the judgment may be: *Bell v. State*, 45 Am. Dec. 130. It is a general rule that the judgment and proceedings of another competent court cannot be reviewed on *habeas corpus*: *Platt v. Harrison*, 71 Id. 389, and note 391; *Ex parte Shaw*, 70 Id. 55.

ERRORS AND IRREGULARITIES CANNOT BE REVIEWED ON HABEAS CORPUS: *Ex parte Shaw*, 70 Am. Dec. 55; *Williamson's Case*, 67 Id. 374; note to *Commonwealth v. Lecky*, 26 Id. 49. But jurisdiction is always an open question on *habeas corpus*: See note to *Williamson's Case*, 67 Id. 395; and where it exists, an imprisonment for disobedience of orders, judgments, and decrees of court is valid; otherwise not: See note to *Commonwealth v. Lecky*, 26 Id. 49; Church on Habeas Corpus, secs. 323, 324, where this subject is fully discussed.

DUE PROCESS OF LAW, WHAT IS: See note to *Bank of the State v. Cooper*, 24 Am. Dec. 538, 542; note to *Brown v. Hummel*, 47 Id. 440; note to *First River Steamboat Co. v. Foster*, 48 Id. 272; *Embury v. Conner*, 53 Id. 325.

INHERENT POWER OF COURTS TO PUNISH FOR CONTEMPT: See extended note to *Clark v. People*, 12 Am. Dec. 178; *State v. Woodfin*, 42 Id. 161; *Neal v. State*, 50 Id. 209; note to *Brown v. Brown*, 58 Id. 642; *Ex parte Adams*, 59 Id. 234; *Adams v. Haskell*, 65 Id. 517; *Williamson's Case*, 67 Id. 374.

WANT OF JURISDICTION RENDERS COMMITMENT FOR CONTEMPT VOID: *Williamson's Case*, 67 Am. Dec. 374; *Adams v. Haskell*, 65 Id. 517; note to *Piper v. Pearson*, 61 Id. 442. The subject of reviewing judgments for contempt is considered at length in the note to *Clark v. People*, 12 Id. 184. Where the facts plainly show that the alleged contempt is not one in reality, the prisoner may be discharged on *habeas corpus*: See note to *Commonwealth v. Lecky*, 26 Id. 49. As to assailing judgments for contempt by *habeas corpus*, see Church on Habeas Corpus, secs. 306-346.

RIGHT TO SPEEDY TRIAL is discussed in an extended note to *Nixon v. State*, 41 Am. Dec. 604.

THE PRINCIPAL CASE WAS CITED in *Robb v. McDonald*, 29 Iowa, 333, to the point that a commitment for contempt, made by a justice of the peace, will not be examined into any sooner than contempts of the processes of courts of general jurisdiction. Under the Iowa code, a justice of the peace has power, upon the application of a person desirous of obtaining the affidavit of another, to require the appearance of the latter before him by a subpoena issued for that purpose; and a refusal to obey a subpoena of the justice thus issued, or to answer when brought before him, is a contempt of his rightful authority, for which the person refusing may be committed by the justice. It will not excuse the witness, nor will it furnish ground for release from such commitment on *habeas corpus*, that the desired affidavit would not be legally admissible in the proceeding pending in another forum, and in which it is desired to be used. The witness or person subpoenaed cannot make himself judge of this matter; neither will a court or judge determine it in advance for him: Id. "Due process of law" means ordinary judicial proceedings in courts: *Stewart v. Board of Supervisors etc.*, 30 Id. 28, citing the principal case.

HOLLOWAY v. SHERMAN.

[12 IOWA, 282.]

LEGISLATURE MAY CHANGE REMEDIES SO LONG AS IT DOES NOT substantially impair them.

PROCEDURE REGULATING REMEDY BEFORE JUDGMENT MAY BE CHANGED by giving defendant an enlarged time for answering, if it leaves plaintiff's remedy, in other respects, just as it existed under previous laws.

ACT TO REGULATE FORECLOSURE OF MORTGAGES BY GIVING DEFENDANT NINE MONTHS ADDITIONAL TIME IN WHICH TO ANSWER does not violate the constitutional prohibition that no law shall be passed impairing the obligation of contracts.

A STATEMENT of the facts is presented in the opinion.

Grant and Smith, for the appellant.

Bennett and Patten, for the appellee.

By Court, LOWE, C. J. On the seventh day of April, 1860, an act to regulate the foreclosure of mortgages became a law, by publication, and was to expire by its own limitation on the first day of January following. This act declared "that in actions commenced, or to be commenced, between these two periods of time, for the foreclosure of mortgages, the defendants should not be held to answer therein, until the expiration of nine months after the date of the service of the original notice in such actions on the first defendant served."

The plaintiff in his suit of foreclosure effected service after said law had taken effect, but claiming the constitutional invalidity of said act, insisted upon a judgment against the defendant at the succeeding term in course. The defendant resisting, the only point of controversy is, whether the said act is valid under the constitution as to past contracts of the description of those upon which the plaintiff had brought suit.

Being unprepared to fix with precision the dividing line between acts strictly remedial, and those impairing the obligation of contracts, we shall hold that the foregoing act is valid, founding our opinion more upon precedent than upon principle; and referring to the following cases to sustain the decision: *Chadwick v. Moore*, 8 Watts & S. 49 [42 Am. Dec. 287]; *Morse v. Gould*, 11 N. Y. 281 [62 Am. Dec. 103]; *Hearne v. Harbison*, 9 Ala. 781; *Bronson v. Newberry*, 2 Doug. (Mich.) 88; and *Rockwell v. Hubbell*, Id. 197 [45 Am. Dec. 246].

We admit the difficulty of reconciling the opinion here expressed, with some of the general principles laid down in the case of *Rosier v. Hale*, 10 Iowa, 470 [77 Am. Dec. 127]. Yet

whilst those principles are derived from and founded upon the highest elementary authority, it will be remembered that we expressly limited our decision in that case to the particular facts making up its history, and not intimating any opinion upon other phases of the same subject, which we then anticipated would, and which have since arisen. That was a case involving the validity of the appraisement act, which was a radical change of the execution law for the collection and enforcement of a creditor's claim after judgment, and as affecting antecedent debts, it was held to be an infringement of the constitution.

The statute under consideration changed the law of procedure regulating the remedy before judgment, and simply gave to the defendant an enlarged time for answering, leaving the remedy of the plaintiff in all other respects just as it existed under the previous law.

Chancellor Kent's rule is, "that the constitution shall not be deemed violated so long as the contracts are submitted to the ordinary and regular course of justice, and the existing remedies are preserved in substance." Tested by the spirit and true intendment of this rule, which is about as definite as can be framed under the circumstances, it may well be doubted whether the plaintiff's remedial rights have been substantially interfered with by the provisions of said act. We find no adjudicated case that has carried the principle involved in this class of cases to that extent, and shall not be the first to push it beyond its present limits.

The judgment below will be affirmed.

LEGISLATURE MAY CHANGE REMEDIES, but not to such an extent as to impair the obligation of contracts: *McMillan v. Sprague*, 35 Am. Dec. 412; *Coriell v. Ham*, 61 Id. 134; *Lord v. Chadbourne*, 66 Id. 290; *Robinson v. Magee*, 70 Id. 638; *Moore v. Luce*, 72 Id. 629; *Von Baumbach v. Bade*, 76 Id. 253, and note 293, showing when the obligation of contracts is impaired by laws affecting remedies; *Reapers' Bank v. Willard*, Id. 755.

CONSTITUTIONALITY OF STATUTES ENLARGING TIME FOR FORECLOSURE OF MORTGAGES, LIENS, ETC.: See note to *Griffin v. McKemie*, 50 Am. Dec. 389, and note thereto 391, showing when statutes of limitation are constitutional: *Scobey v. Gibson*, ante, p. 490.

THE PRINCIPAL CASE WAS CITED in *McCormick v. Rusch*, 15 Iowa, 138, to the point that a statute regulating the foreclosure of mortgages, and which enlarges the time given to defendant to answer, so as to extend it for nine months after service, is constitutional. And in *Watts v. Everett*, 47 Id. 272, to the point that a statute which pertains to the remedy, and in no way impairs the obligation of the judgment, nor deprives the plaintiff of his remedy, may have a retroactive effect.

STOUT v. CITY FIRE INS. CO. OF NEW HAVEN.

[12 IOWA, 371.]

MISTAKE IN STATING INSURABLE INTEREST IN POLICY OF INSURANCE MAY BE CORRECTED upon averment of intention and mistake, when issue is joined thereon. Thus where the actual interest of one in premises insured is a mechanic's lien, but such interest was described in the policy as that of a mortgagee, which description was declared to be and was believed to be sufficient to embrace a mechanic's lien, the insured may show the mistake as one of fact, by evidence admissible in a proper chancery proceeding, and recover on the instrument as corrected.

POLICY OF INSURANCE IS ADMISSIBLE TO PROVE MISTAKE THEREIN AND INTENTION OF PARTIES, where issue has been joined upon an averment of intention and mistake, and where the parties have stipulated that any evidence may be introduced to correct it which would be received in a proper chancery proceeding.

MECHANIC'S LIEN ON PROPERTY CONSTITUTES INSURABLE INTEREST THEREIN.

ASSIGNMENT OF POLICY OF INSURANCE MAY BE MADE WITH CONSENT OF INSURER, and such assignment will pass with it everything necessary to carry the purpose of the assignment into effect, though an actual assignment of the original indebtedness is not made.

WARRANTIES IN POLICIES OF INSURANCE ARE AFFIRMATIVE or express, and promissory or executory. There may be several warranties, and of each class, in one policy. Stipulations in policies are considered express warranties.

EXPRESS WARRANTY IS AGREEMENT EXPRESSED IN POLICY whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done. It is not requisite that the circumstances or act warranted should be material to the risk.

EXAMPLE OF POLICY CONTAINING BOTH AFFIRMATIVE AND EXECUTORY WARRANTIES.—Where policy recites in description of building insured that it is "occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy," the recital as to the occupancy of the lower story is an affirmative or express warranty, which, if false at the time the policy was issued, will operate to avoid it, whether material to the risk or not; but it is not a continuous warranty. The stipulation, however, in regard to the upper story of the building is a promissory or executory warranty, a non-compliance with which, at any time during the existence of the policy, will operate to avoid it, whether material to the risk or not.

PARTIES TO POLICY OF INSURANCE MAY FIX TIME WITHIN WHICH SUIT MUST BE COMMENCED, and it will, in the absence of qualifying circumstances, be valid and binding upon them. But where the interest insured was a mechanic's lien, and the insured or his assignee was required to make proof to the insurer of the value of the interest insured, which proof could not be made in a legitimate manner within the time stipulated, the stipulation was held to be inoperative.

ACTION on policy of insurance. A statement of facts is presented in the opinion.

Wilson, Ulley, and Doud, for the appellant.

Bissell, Mills, and Shiras, for the appellee.

Samuels, Allison, and Crane, for the appellants, in reply.

By Court, BALDWIN, J. This action was brought by the plaintiff, as the assignee of a policy of insurance issued to William Longhurst. The interest of the insured is indicated in the following language: "In consideration of one hundred dollars to them [meaning the defendants] paid by the assured hereafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst, mortgagee, Dubuque, Iowa, against loss, etc., to the amount of five thousand dollars in Lawrence block, in the city of Dubuque;" which policy was assigned to plaintiff, the consent of the company being signified in writing, on the back of the policy. The policy bears date October 18, 1857, to continue one year, against loss by fire.

The petition avers that the interest of said Longhurst, in said Lawrence block, was a mechanic's lien, and that the term "mortgagee" was intended to include and describe a mechanic's lien, and that said Longhurst so made his interest known to the defendant at the time he made application for the insurance, and when the insurance was effected; and that it was by mistake of the agent of the company that the word "mortgagee" was inserted in said policy; and that said agent at the time the policy was executed assured Longhurst that such description was sufficient to indicate the nature of the interest held by him, and which he desired to have insured. Upon this averment of intention and mistake, issue was joined, and the parties stipulated in writing that any evidence to correct any mistake in the terms of the policy sued on might be introduced in this proceeding which might be given in a proper chancery proceeding for the same purpose, and that relief should be granted accordingly under the issue thus made.

Here, there was an issue or matter of fact, upon which the jury, under the instructions of the court, could properly find. Under this issue, the plaintiff proposed to introduce the policy above referred to as evidence; to which the defendant objected, for the reason that its terms showed that the interest of a "mortgagee" was insured, which objection was overruled by the court. Numerous other objections having the same object in view, and tending to the same end, were disposed of in the same manner. We do not deem it necessary to exam-

ine minutely the several objections as made by the defendant. We can see no good reason why the policy should not have been introduced, with any other testimony which tended to prove the mistake or intention of the parties, under the issue and stipulations filed.

It is claimed by the defendant that if the mistake which is sought to be reformed and corrected is one of law, that the same cannot be reformed. And also, that if there was a mistake between the parties, it was one of law purely, and that the parties thereto must abide the consequences. This, no doubt, is the common-law doctrine, and if the code (sec. 2401) did not control this doctrine to some extent, we should, perhaps, examine the question more minutely. We think, however, that the issue in this case made a question of fact, upon which the jury could legitimately find, and as both the insured and the agent who issued the policy testified that the applicant desired to be insured against loss by fire, upon an interest which he held as a mechanic's lien, and that he was persuaded by the company, at the time the term "mortgagee" was inserted in the policy, that it covered that interest, and he was thereby induced to accept the policy; and as both the evidence and the instructions clearly indicate that the jury did find upon this issue, we are not disposed to disturb that finding. There is no conflict of evidence upon this point, and the matter was properly submitted to the jury under this issue.

There are three other assignments, upon which counsel for appellant claim a reversal, which we think proper to consider, the contract being treated as reformed, and a mechanic's lien being insured.

I. It is claimed that Longhurst had no insurable interest in the building, and that if he had, the said assignment was void, the original indebtedness of David, the owner of the building insured, not having been assigned.

1. Had Longhurst an insurable interest in the property insured? The testimony shows that Longhurst had done work under a contract with the owner of the building insured; that the building was consumed by fire on the twenty-first day of January, 1858; and that at the first term of the court next thereafter, he prosecuted his suit against the said owner for the sum of eighteen thousand dollars, and that he finally obtained judgment for the sum of seventeen thousand one hundred and twenty-five dollars, and established his mechanic's lien upon the lots upon which the insured building was located. The

judgment thus rendered is the highest grade of evidence, and conclusive until reversed. We can come to no other conclusion, taking all of this testimony, than that Longhurst had a legitimate interest in said building. Then, if legitimate, is it not a subject in relation to which parties may contract? And if so, why may not the insurance company contract to insure that interest? The policy itself shows that it is the ostensible business of the company to take such risks, and if the subject-matter of the contract is legitimate, why is not the interest insurable?

2. Can this policy be assigned without making an actual assignment of the original indebtedness which was the basis of the lien? The policy contains the following language: "And the said company [meaning defendant] promise to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss," etc. And in the fourth clause of the annexed conditions, we find the following: "Policies of insurance, subscribed by this company, shall not be assignable without the consent of the company indorsed thereon. In case of an assignment without such consent, whether of the whole policy, or any interest therein, the liability of the company, in virtue of such policy, shall therefrom cease." We think this language clearly indicates that the parties themselves have controlled this matter of assignment, and a necessary construction shows that the policy may be assigned, if the company first give their consent in writing. The testimony clearly shows that the plaintiff, as assignee, held the policy by virtue of said assignment, and as collateral security for an indebtedness of Longhurst to plaintiff. The indemnity is not so separated from the original indebtedness of Longhurst as to render it void. The assignment passes with it all the necessary functions to carry the object of it into effect. The intention of the assignment was to place the assignee in the shoes of the assignor, so far as to recover the money in case of a destruction by fire of the property insured—a mere direction that the money should be paid to plaintiff. We can but determine that the plaintiff had an insurable interest in the property insured, and that the assignment was legitimate, and being with the consent of the company, and for a proper purpose, it did not render the policy void.

II. It was claimed that there was a warranty by the party insured that the occupation of the property insured, or the business carried on in the same, should be continued as it was

when the insurance was affected during the continuance of the policy; and that the business not being so continued, there was a breach of the warranty, and that plaintiff should not recover. Was there such a warranty as is claimed? The language of the policy, which the defendant claims, in law, amounts to a continuous warranty, is as follows: "In consideration of one hundred dollars to them [the company] in hand paid by the assured, the receipt whereof is hereby acknowledged, do insure William Longhurst [mortgagee] against loss or damage by fire, to the amount of five thousand dollars, on the five-story brick building, and the three-story addition, known as the Lawrence block, occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy." The testimony is that a portion of the lower story of the building was occupied for a dancing academy, in the month of December, 1857. Defendant claims that the language in the policy, "occupied for stores below," is, in law, a warranty that the same should continue to be thus occupied during the continuance of the policy, and that any change in the use of the rooms below was a breach of such warranty, and avoided the liability of the company.

We will inquire first, What is a warranty in a policy of insurance against loss or damage by fire? And the facts of this case will necessarily lead us to inquire as to the different kinds of warranties, whether express, promissory, or executory. There may be several warranties, and of each class in one policy. "The stipulations in policies are considered express warranties. An express warranty is an agreement expressed in the policy whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts, relating to the same subject, have been or shall be done. It is not requisite that the circumstances or act warranted should be material to the risk:" *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488, and cases cited. There may be affirmative and promissory or executory warranties: See Angell on Fire Insurance, sec. 145, and cases cited.

The policy in this case contains both affirmative and executory warranties: 1. The acceptance of the policy with the clause that the lower story of the building insured was, at the time the policy was effected, occupied for stores, was an affirmative or express warranty that the same was at the time so occupied. And if the representation was false, in other words, if the lower story was not then so occupied, whether material

to the risk or not, would avoid the policy; 2. The upper portion of this building insured, as set forth in the policy, was to remain unoccupied during the continuance of the policy. This portion is promissory or executory, and must be strictly complied with on the part of the assured, or the policy will be avoided, whether material to the risk or not. The distinction between the affirmative or express and promissory or executory warranties is very perceptible in this case. The former represents that a certain fact did exist at the time the policy was effected; and the latter, that a certain thing should exist during the continuance of the policy—both made equally material by the parties themselves, and each fatal to the assured if false or not executed. Even if it be admitted in this case, as claimed by defendant, the evidence fails to show that the plaintiff had the control of the building insured; he did not stipulate that the lower story of the building should continue to be occupied for any particular purpose during the continuance of the policy. There is nothing of that kind on the face of the policy, nor is there anything in the by-laws or conditions annexed to the policy preventing a change of business, if said change does not add materially to the risk taken. The policy may be wholly avoided by the using of the building insured for the purposes that are specially prohibited in the by-laws or conditions annexed to the policy, classified as hazardous and extra-hazardous. Or it may be made void by materially increasing the risk in any other manner. The representation in the policy—"the lower story occupied as stores"—indicates that the same was so occupied at the time the insurance was effected, and is not a continuous warranty: See *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122. If not continuous, no breach of the warranty can be claimed.

III. It is claimed that the plaintiff ought not to have recovered in the court below, for the reason that he was concluded, he not having brought his suit within twelve months after the loss, so provided in a by-law, or condition attached to the policy. The petition thus referred to reads as follows: "It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or change shall occur, and in case any suit or action shall be commenced against said company after the

expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced."

We are brought directly to the inquiry, whether this provision attached to the policy is binding in ordinary cases, and if so, are there any circumstances that make it inoperative in this case?

The third instruction asked by plaintiff, and given by the court, is placed upon the hypothesis that such a stipulation or condition is in all cases invalid and void, and that it is no bar to an action, although it may have been commenced after the twelve months expired; that it contravenes the statute of Iowa, and although inserted in the policy, or in the conditions annexed thereto, and made a part of the contract, it is of no force whatever. It is admitted by counsel in their argument that the authorities are somewhat in conflict upon this subject. After an examination of those cited in the briefs, so far as we have been able to refer to them, we come to the conclusion that where there are no qualifying circumstances controlling the same, the weight of authority supports the validity of this provision. In other words, that such regulation may be made by the company, and when accepted by the assured, in ordinary cases, it becomes valid and binding. We are unable to see why the contract to take risks may not be treated as any other contract or stipulations mutually binding upon the parties thereto, unless it is tainted with fraud, is against the policy of the country, or in some manner contravenes the law. Why may not parties to a contract fix their own terms, as well as the time of bringing suit, or any other ingredient entering therein? It is a matter of mutual agreement between the parties themselves. They may have the benefit of the statute of limitation, unless they waive it and fix their own limitation. This clause in the contract in ordinary cases may be the inducements for the one party or the other to enter into it, and as a matter of right, it should be regarded as valid. We therefore do find that the court below ruled erroneously upon this question, both in giving the instructions of plaintiff, and in refusing those asked by defendant.

But while it is true that this provision should, in ordinary cases, be held as valid, yet a contract of insurance is treated like any other contract; and the same rules of construction

the intention of the parties thereto should govern its construction: *Cress v. Shullife*, 1 Id. 645; *Patapoco Ins. Co. v. Biscoe*, 28 Id. 219.

PARTIES TO CONTRACT OF INSURANCE MAY LAWFULLY CONTRACT AS TO WHEN SUIT MAY BE BROUGHT UPON IT: *Fullam v. New York U. Ins. Co.*, 68 Am. Dec. 462, and note 464.

THE PRINCIPAL CASE WAS DISTINGUISHED IN *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 457, 458. The former case does not indicate what constitutes an occupancy; the latter does. In *Longhurst v. Star*, 19 Id. 370, 372, the principal case was cited to the last point in the *syllabus*, *supra*. Warranty must be true in every particular, whether material to the risk or not: *Wilkinson v. Conn. Mut. Life Ins. Co.*, 30 Id. 125. Where the interest insured is a mechanic's lien, or one of such a character that a proceeding in court is necessary to determine its extent and value, the period of limitation created by a provision of the policy does not begin to run until the termination of such proceedings: *Ellis v. Council Bluffs Ins. Co.*, 64 Id. 510, a case similar to the principal one.

THORNTON v. MULQUINNE.

[12 Iowa, 542.]

ADMINISTRATOR'S SALE OF DECEDENT'S REAL ESTATE CANNOT BE UPHOLD, under the Iowa statute, where the probate records show that the administrator did not take the required oath, that lawful notice was not given of the sale, and in the absence of evidence that the premises were sold at public auction. These defects alone are fatal to the purchaser's title, particularly where the records show that no petition for the sale was filed, and where they do not show that any sale was ever made, except the fact that an administrator's deed was executed, but which did not show that it was made pursuant to a sale ordered by the probate court. **INSTRUMENT SHALL BE SO CONSTRUED AS TO PASS ESTATE,** when such was the intention of the party executing it. This is the modern rule. **MORE RELEASE OF RIGHT TO ONE NOT SEIZED or in possession of the estate** passed nothing as a release at common law.

"ESTATE" INCLUDES EVERY KIND OF PROPERTY. In a will, it passes the fee without words of inheritance. It carries everything unless tied down by particular expressions.

ALTHOUGH INSTRUMENT IS NOT CALCULATED TECHNICALLY TO EXECUTE INTENTION of grantor to convey and in the grantee to take, yet it should be made to operate in some other way to effect such purpose where it is apparent that such intention existed.

EXAMPLE OF DEED OF RELEASE SUFFICIENT TO PASS ESTATE.—An intestate having died without issue, his father, who was his sole heir at law, executed to his son's widow the following release or relinquishment: "I, P. T., sen., do hereby release and relinquish all and every claim and demand which I may have against the estate of P. T., jun., late of Jackson county, deceased; and also relinquish all my right as heir to the above estate to and in favor of A. T., widow of the deceased." *Held*, 1. That it was not void for want of a consideration, or a description of the property conveyed, or as a release unsupported by a precedent estate in the releasee; 2. That it was sufficient to pass the entire interest of the grantor, as heir, in the real as well as the personal estate of the deceased.

INSTRUMENT SET OUT IN PLEADINGS, THOUGH CALLED BY WRONG NAME, is to have effect according to the intention of the parties. Thus if a release, so called by the pleader, operates in any way, whether as a deed of bargain and sale, a covenant to stand seised, or as an instrument in any manner effectual to pass title, the pleader is to have the benefit of it.

PATRICK THORNTON, JUN., died in July, 1849, without issue, but left a widow, Anne Thornton, the daughter of respondent, Margaret Mulquinne. Patrick's father died in September, 1849. The widow of Patrick, jun., died in September, 1851. Patrick, jun., died seised of certain real estate here in controversy. Complainants, the brothers and sisters of said Patrick, claimed the property as such heirs. Respondent claimed it under an administrators' sale, and further insisted that Patrick Thornton, sen., had sold or released it to the widow Anne, by an instrument which appears in the opinion. The sufficiency of the probate proceedings and alleged conveyance were brought into question. A further statement of facts is presented in the case.

B. W. Poor, for the appellants.

W. E. Leffingwell, for the appellee.

By Court, WRIGHT, J. The bill was dismissed in the court below, and complainants appeal. This ruling must be sustained, if at all, upon the effect to be given to the instrument signed by the father, and not upon the probate proceedings. Several insurmountable difficulties meet us in the consideration of this part of the defense. The alleged sale was made in 1850, and is to be governed by the statute of 1843, c. 10, p. 706, 713. All the proceedings are embodied in the record, and these defects may be mentioned: We find no petition by the administrators for the sale of the land. There is no evidence that notice was given of the pendency of a petition for that purpose. It nowhere sufficiently appears that notice was given of the sale as required by law. The administrators took no oath, as required by section 11 of said chapter. And finally, there is no record that a sale ever was made. It is true that a deed seems to have been executed, but there is nothing to show that it was made pursuant to a sale ordered by the probate court. Under such circumstances, the sale cannot be upheld. The absence of the required oath, of the notice of sale, and evidence that the premises were sold at public auction, are fatal to the defendant's title: See sec. 36, c. 10, p. 713; *Cooper v. Sunderland*, 8 Iowa, 114 [66 Am. Dec. 52]; *Morrow*

v. *Weed*, 4 Id. 77 [66 Am. Dec. 122]; *Little v. Sinnett*, 7 Id. 324.

2. The son having died without issue, in the absence of a will, the property descended to his father. On the twenty-first of August, 1849, he executed and delivered to the widow of his son the following instrument:

"State of Iowa, Jackson county, ss.

"I, Patrick Thornton, of said county, on this twenty-first day of August, 1849, do hereby release and relinquish all and every claim and demand which I may have against the estate of Patrick Thornton, jun., late of Jackson county, deceased, and also relinquish all my right as heir to the above estate, to and in favor of Ann Thornton, widow of the deceased.

"Given under my hand and seal, the day and year above written.

PATRICK THORNTON. [SEAL.]

"Done in presence of E. B. Curtiss, Sylvester Stephens."

This was not acknowledged, but proof of its execution was made, under sections 12 et seq., chapter 54, Laws of 1843, and to it in this respect no exceptions are taken by complainants. They claim, however, that it did not divest the estate of the father, and that the title is therefore in them as his children and heirs.

If the instrument is operative, we think it was intended to pass the interest of the grantor to the real as well as the personal estate. In the first place, it appears affirmatively by evidence *aliunde*, that there was no personal estate, or at least a small amount, which would be and was vastly more than consumed by the expenses of the administration. There was therefore, in fact, no personalty upon which the instrument could exclusively operate. But without giving weight to this consideration, we turn to the language of the instrument itself. That it means 'more than a relinquishment of any personal demand the father may have had against the estate of the son, is manifest from the fact that this end was fully and entirely effected by the language used in the first part, and to say that the concluding part accomplished no more would make it surplusage and unmeaning tautology.

The language used is brief, simple, but comprehensive: "All my right as heir to the above estate." He was the heir, and as such held the fee to these lands, subject to the debts of the deceased son, and the widow's dower. If he could thus relinquish his right to the land, the language employed is certainly broad enough for that purpose. This general expres-

sion, if collocated with words descriptive of personal estate, might, upon authority, be restrained to subjects of the same species. If not thus restrained, "estate" includes every kind of property. In a will, at least, it passes the fee without words of inheritance. It carries everything, unless tied down by particular expressions: *Turbett v. Turbett*, 3 Yeates, 187 [2 Am. Dec. 369]; *Holdfast v. Marten*, 1 T. R. 411; *Busby v. Busby*, 1 Dall. 226. It is said to be *genus generalissimum*. And see *Blagge v. Miles*, 1 Story, 438; *Jackson v. De Lancey*, 11 Johns. 364 [7 Am. Dec. 403]; *Godfrey v. Humphrey*, 18 Pick. 537 [29 Am. Dec. 621]. But, then, treating this instrument as a deed, whether of bargain and sale or otherwise (which will be examined hereafter), there is certainly nothing to limit or restrain the language to personalty. Existing personal and real property, it belonged to the estate of his son and descended to him as his heir. And it is his right as heir to such estate that he relinquishes. Not only his right as heir to one kind of property to the exclusion of the other, but to all the estate—the entire estate. We know of no rule that would confine or restrain the word "estate" in the manner claimed. And the use of the word "heir" is appropriately of force in this connection. If this had been omitted, there would have been more plausibility in complainant's position. Its use and relation to the other language of the instrument, naturally conveys the impression that the party had reference to that which he had alienated of a permanent nature, rather than a claim to chattels or personal estate.

But it is urged that the instrument is not good as a release, for the reason that it does not appear that the releasee had a former estate in possession. At common law, it is not to be contested that a mere release of a right to one not seised or in possession of the estate passed nothing as a release. But this doctrine was qualified very much even in ancient times. And this because of a proper desire on the part of courts to give force to the intention of the parties. The true principle, and one entirely in accordance with modern jurisprudence, is, that all instruments shall be so construed as to pass an estate, when such was the intention: *Russell v. Coffin*, 8 Pick. 143; *Shep. Touch. 82*. The rule is thus expressed in the case cited by Parker, C. J.: "When it is apparent that there was an intention in the grantor to convey, and in the grantee to take, although the instrument is not calculated technically to execute that intent, it should be made to operate in some other

way to effect the purpose;" citing *Roe v. Tranmer*, 2 Wils. 78; *Clanrickard v. Sidney*, Hob. 277; *Crossing v. Scudamore*, 1 Vent. 141. The same rule is thus expressed in *Pray v. Pierce*, 7 Mass. 381 [5 Am. Dec. 59]: "It is the duty of the court to so construe the instrument as to give effect to the lawful intent of the parties, and not to defeat it." And hence a deed of lease and release has been holden to be a covenant to stand seised to uses when the consideration was a good one: *Roe v. Tranmer*, 2 Wils. 78. So a bargain and sale from a parent to a child, to take effect upon the death of the parent, has been holden to be a covenant to stand seised to the use of the parent for life, with a vested remainder to the children in fee; because as a bargain and sale it would have been a conveyance of a freehold *in futuro*, and therefore void: *Wallis v. Wallis*, 4 Mass. 185 [8 Am. Dec. 210]. And that the element of possession to uphold a deed of release is founded upon the merest technicality, see *Hamblet v. Francis*, Id. 78, where the controversy related to a parcel of flats below high-water mark, and when the releasee used them alone for the purpose of laying mud coasters and other vessels on them. And this was held proper evidence of possession, to be left to the jury. And as to presumptions on this subject, see *Reformed Dutch Church v. Veeder*, 4 Wend. 494; see also *Poor v. Robinson*, 10 Mass. 131. And for remarks upon a kindred subject, and here applicable, see *Pierson v. Armstrong*, 1 Iowa, 295 [63 Am. Dec. 440]. It is there said: "We have not the various estates formerly known in England, with their complication of law. We have no occasion for their former distinction of conveyances. Is it not the intent and tone and spirit of all our laws and institutions, and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please, so that others having legal or equitable claims on us are not injured?" And it may be remarked that those having such claims are creditors and *bona fide* purchasers, and not heirs.

Parker, C. J., in *Russell v. Coffin*, 8 Pick. 143, uses this strong language: "This deed cannot operate as a release from the technical objection that Russell was not then in possession. But shall the deed have no effect? Was it not the intent that Coffin should sell, and that Russell should purchase? It would be going back to the dark ages to say that it shall have no effect, when between the parties it was supposed to be as good and effectual to pass the estate as a deed

of bargain and sale should be. . . . Now, if the releasor is seised so as not to sell a pretended title, there can be no reason why his deed of quitclaim should not pass the estate. If he is not seised, and the releasee is not in possession, then nothing passes by the deed; though it may then operate as an estoppel against the releasor. We think it immaterial whether this deed is to operate as a gift, a bargain and sale, or a covenant to stand seised; it is sufficient that it passes the estate."

But it is said that the instrument cannot operate as a bargain and sale, for want of a consideration. Such a deed, at common law, requires a pecuniary consideration, though none need be expressed: 4 Cru. Dig. 110; *Jackson v. Fisk*, 10 Johns. 456; *Underwood v. Campbell*, 14 N. H. 393; *Rogers v. Hillhouse*, 3 Conn. 398. Not only so, but the seal imports a consideration: *Williams on Real Property*, 143; *Mansfield v. Watson*, 2 Iowa, 111. Nor has the rule of pleading at common law, that an action of *assumpsit*, a release, or discharge must be specially pleaded, an application in this case. Nor is it true that, if the pleader has called it a release, when in fact it is something else, the instrument shall not have effect according to the intent of the parties. In this instance, the pleader sets out the instrument, and in the answer states what he understands to be its legal and equitable force and effect. If it operates in any way, whether as a deed of bargain and sale, a covenant to stand seised, or in any manner is effectual to pass the title, respondents thereto have the benefit of it. There is nothing in the state of the pleadings to prevent it.

If, however, the deed is not to be upheld as one of bargain and sale, why not as a covenant to stand seised to the use of the grantee, and thus pass the freehold? It is said that the consideration—a pecuniary one being out of the way—is not sufficient. And the argument is, that at common law, this consideration is "near blood relationship between the parties, or a contemporaneous or prospective marriage;" that the relation of father and daughter-in-law is not sufficient, and that the deed must therefore fail. Now, there are not wanting authorities to uphold this deed on this ground. The case of *Bell v. Scammon*, 15 N. H. 381 [41 Am. Dec. 706], is in no respect different from this, except that there the grantee was the son-in-law; here, the daughter-in-law. In this case, there was no issue; in that, one child, who died before the execution of the deed. In that case, Gilchrist, J., says: "The boundaries which exclude persons as too remote to be within its influence have

never yet been defined." In *Shep. Touch.* 511, 512, it is said that such a deed will be good, if made to the intended wife of a cousin. If so, the wife of a deceased son would seem to be equally sufficient. The case of *Gale v. Coburn*, 18 Pick. 397, differs from this in the fact that the grantor was the grandfather of two children of the grantee, then living; the grantee being a son-in-law. The case of *Corwin v. Corwin*, 6 N. Y. 342 [57 Am. Dec. 453], cited by counsel, holds a contrary doctrine. Is not reasoned, however, and no authorities are cited in support of the doctrine. In *Jackson v. Sebring*, 16 Johns. 515 [8 Am. Dec. 357], however, the whole doctrine is very fully discussed, and under the authorities there cited, and the principles there recognized, the consideration would not be sufficient to support this instrument as a covenant to stand seised. And indeed, the weight of the authorities are against it. Whether they adopt the most reasonable and just rule, we very much doubt.

One suggestion more before leaving this part of the case. This is a bill in equity to settle and quiet the title to these lands. If there was a valuable or pecuniary consideration, then the deed would be good, if not otherwise objectionable as a contract to convey, and especially if possession accompanied it. This rule was recognized in *Switzer v. Knapps*, 10 Iowa, 72 [74 Am. Dec. 375]. And *quære*, if a portion of these lands constituted the homestead of a son, would not the possession and interest of the widow therein be sufficient, since the adoption of the code of 1851, to support a release, under the strict common-law rule?

Finally, it is urged that this instrument is void for want of a description of the land conveyed. And here it is important to keep in view the relation of the parties and the purpose designed to be accomplished. The father was the heir to all of his son's estate, subject to the widow's dower, and the payment of debts. He was willing to relinquish and assign his interest in that estate, of every character, to the widow. What was the consideration or motive prompting is not disclosed, and we can only presume that it was sufficient.

In the absence of fraud, of evidence that the party acted in ignorance of his rights, the nature and extent of the interest and estate he was thus relinquishing, or some other fact of a like nature, a conveyance should not in equity be held inoperative for want of a specified description of the property real and personal. If he was conversant of his rights, he could sell by

general description: *Underwood v. Campbell*, 14 N. H. 893; *Smith v. Pendell*, 19 Conn. 107 [48 Am. Dec. 146]; *Jackson v. De Lancey*, 11 Johns. 864 [7 Am. Dec. 403]; *Litchfield v. Cudworth*, 15 Pick. 23.

Affirmed.

STATUTES AUTHORIZING SALES OF DECEDENT'S LANDS MUST BE STRICTLY FOLLOWED: *Currie v. Steuart*, 61 Am. Dec. 501, and collected cases in note thereto 503; *Stevenson's Heirs v. McReary*, 51 Id. 102, and collected cases in note thereto. They must be strictly complied with in every particular: See case last cited; and such compliance must be shown by the record: *Gelstrop v. Moore*, 59 Id. 254.

NOTICE, DEFECTS IN GIVING, EFFECT OF UPON ADMINISTRATOR'S SALE: *Mitchell v. Bowen*, 65 Am. Dec. 758, and note 760; *Bland v. Muncaster*, 57 Id. 162; *Reynolds v. Wilson*, 60 Id. 753, and note 755; note to *Haynes v. Meeks*, 70 Id. 710.

INSTRUMENTS ARE TO BE SO CONSTRUED AS TO GIVE EFFECT TO INTENTION OF PARTIES THERETO: *Consell v. Pumphrey*, 68 Am. Dec. 611, and collected cases in note thereto 615; *Schultz v. Young*, 40 Id. 413; *Pike v. Monroe*, 58 Id. 751; *Budd v. Brooks*, 43 Id. 321; *Frost v. Spaulding*, 31 Id. 150.

RELEASE OF LAND INVALID, WHEN: *Porter v. Perkins*, 4 Am. Dec. 52. Release to one not in possession, if made for a valuable consideration, will be construed to be a conveyance effectual to pass the estate: *Pray v. Pierce*, 5 Id. 59.

"ESTATE," DEFINITION OF: See *Tolar v. Tolar*, 14 Am. Dec. 576, and cases there cited.

CITATIONS OF PRINCIPAL CASE.—In considering the question of notice, the court, in *Good v. Norley*, 28 Iowa, 195, made an unimportant reference to the principal case; and in *Pursley v. Hayes*, 22 Id. 20, it was called a direct proceeding to set aside a sale made by an administrator. Many cases are cited in *Pursley v. Hayes*, *supra*, showing where direct and indirect attacks were made upon sales of various kinds.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY

HALBERT *v.* McCULLOCH

[3 METCALFE, 456.]

WORD "PURCHASER," UNDER KENTUCKY STATUTES, embraces every holder of the legal title to real or personal property acquired by deed.

BONA FIDE MORTGAGEE IS DEEMED PURCHASER within the meaning of the ninth section of the chapter on boats and navigation (R. S. 205), providing that liens therein given shall not be enforced against a purchaser, without notice thereof, unless suit shall be instituted within one year from the time the cause of action accrued, or unless such notice be indorsed on or attached to the enrollment of the boat.

CLAIMANTS UNDER MORTGAGE UPON BOAT, against which an attachment has issued, do not preclude themselves from the right to assert their claim to the property, or to contest the validity of the attachment, by executing a bond to the effect that they would pay such sum as might be adjudged in the action, or to have the boat forthcoming for the satisfaction of such judgment, whichever shall be ordered.

UNDER SECTION 268, CIVIL CODE OF KENTUCKY, concerning the delivery of any vessel attached, upon the execution of a bond to the effect that the obligor will pay such sum as may be adjudged against him, or that the vessel shall be forthcoming to satisfy any judgment which may be rendered, "whichever shall be directed by the court." The latter clause does not confer upon the court an unlimited and arbitrary discretion, either to render judgment for such sum as plaintiff may show himself entitled to recover, and then require the obligor in the bond to pay that sum, or to order the forthcoming of the vessel, subject to the order of the court, for the satisfaction of such sum. Such judgment should be rendered as will protect all the parties, according to the facts as they appear.

WHERE LIEN AGAINST VESSEL IS SOUGHT TO BE ENFORCED BY ATTACHMENT, and it transpires that the equity of redemption of the mortgagor of such vessel is all that can be subjected to plaintiff's demand, such should be the judgment of the court; and to satisfy such judgment, the forthcoming of the vessel may be ordered. To this extent only can the obligor

in a bond, to the effect that they will pay such sum as may be adjudged against them, or have the vessel forthcoming to satisfy such judgment, be held liable for a failure or refusal to comply with the order. The value of the equity of redemption should be ascertained by reference to a master.

PETITION in equity. The opinion contains the facts.

Kinhead and Barr, for the appellants

Speed and Barrett, for the appellees.

By Court, DUVALL, J. Section 9 of the chapter on boats and navigation (R. S. 205) provides that the liens therein given shall not be enforced against a purchaser without notice thereof, unless suit be instituted within one year from the time the cause of action accrued, or unless such notice be indorsed on or attached to the enrollment of the boat.

This action was brought in April, 1859, against the steamboat "Diamond and owners," to recover for supplies which had been furnished the boat in April, 1857. An attachment having been levied on the boat, bond was executed by its captain, with Halbert as surety (under section 268 of the civil code), to the effect that the obligors would pay to the plaintiffs such sum as might be adjudged in the action, or to have the boat "forthcoming, for the satisfaction of such judgment, whichever shall be ordered by the court."

It may be observed here that the latter alternative stipulation of the bond, as given, does not conform literally to that prescribed by the section referred to, which is, "that the boat or vessel shall be forthcoming, and subject to the order of the court for the satisfaction of such judgment as may be rendered therein, whichever shall be directed by the court."

This variance, however, may not be deemed very material, so far as it can affect the present case.

After the execution of this bond, Halbert, the surety, and others, filed their joint petition, asking to be made parties to the action; which was done. They claim an interest in the boat, under a mortgage executed to them by the owners, dated May 18, 1858, to secure certain specified debts and liabilities. The validity of this mortgage is in no way questioned.

Inasmuch, then, as the plaintiffs failed to institute their suit within one year from the time their cause of action accrued, and failed to give notice of their lien in the mode prescribed by the statute, it is clear that they cannot enforce their liens against Halbert, one of the mortgagees, provided he is to be

deemed a purchaser within the meaning of section 9 of the statute.

The word "purchaser," as used in our statutes, has acquired a well-defined technical signification, and embraces every holder of the legal title to real or personal property, where such title has been acquired by deed. There is no exception to this rule. The act of 1811 gave a landlord a right to distrain the goods of his tenant or subtenant; but if a tenant should have made a *bona fide* sale of his goods, they were not liable to distress. In construing this statute, it was held that a mortgage by the tenant of his goods was a sale within the meaning of the act, and that a *bona fide* mortgagee is, both before and after forfeiture, deemed a purchaser: *Snyder v. Hitt*, 2 Dana, 204. It is unnecessary to cite other cases in which the same rule of construction has been recognized.

The appellant, then, being a purchaser, was entitled to priority of lien under his mortgage, as against the plaintiffs, and the chancellor erred in deciding that he was not a purchaser, and was not, therefore, protected by the statute.

The mortgagors had an interest in the boat, and for the purpose of subjecting that interest to the satisfaction of the demand of the appellees, the court might have required the parties in possession, or the obligors in the bond, to have the boat forthcoming, subject to such order as was proper for effectuating that object.

It is admitted that the claimants under the mortgage did not, by the execution of the bond, preclude themselves from the right to assert their claim to the property, or to contest the validity of the attachment. This point was directly decided in *Schwein v. Sims*, 2 Met. (Ky.) 209. The question in that case arose upon a different section of the code, but the principle decided, and the reasoning of the court in support of it, apply with equal propriety to the section under which the bond in this case was given. The expression used in this section, "whichever shall be directed by the court," must not be understood as conferring upon the court an unlimited and arbitrary discretion, either to render a judgment in favor of the plaintiff for such sum as he may show himself entitled to recover in the action, and then to require the obligors in the bond to pay that sum, or to order the forthcoming of the boat or vessel, subject to the order of the court for the satisfaction of such sum. According to that construction, the claimant of the boat or vessel could in no case entitle himself to retain the

possession of his property by executing the bond which was intended to secure that very privilege, without thereby rendering himself liable for whatever sum the plaintiff in the action might show himself entitled to recover against the defendant. As was said in the case just cited, such an interpretation of the obligation would result inevitably in the sacrifice of the property of one to the payment of the debts of another.

In this, as in all other classes of cases, it is the duty of the court to render such judgment as will protect the rights of all the parties, according to the facts as they appear. Here, the effort of the plaintiffs was to enforce their lien against the boat in contest. It turns out that the equity of redemption of the mortgagors was all that could properly be subjected to their demand, and such should have been the judgment of the court, and for the satisfaction of such judgment, the forthcoming of the boat might have been ordered. To that extent, and to that extent only, could the obligors in the bond have been properly held liable for a failure or refusal to comply with the order. The value of the equity of redemption should have been ascertained by a reference to the master.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MORTGAGEE OF PERSONAL PROPERTY is a purchaser for value to the extent of the sum secured: *Lewis v. Love's Heirs*, 38 Am. Dec. 161.

VALIDITY OF ATTACHMENT, WHO MAY QUESTION: See *Samborn v. Kittredge*, 50 Am. Dec. 58; *Smith v. Blatchford*, 52 Id. 504.

BOND GIVEN TO RELEASE ATTACHED PROPERTY. when estops obligor from questioning attachment: *Haggart v. Morgan*, 55 Am. Dec. 350.

EQUITY OF REDEMPTION in mortgage of personal property is not liable to attachment: *Haven v. Low*, 9 Am. Dec. 25; *Badlam v. Tucker*, 11 Id. 202; and see *McLaughlin v. Shepherd*, 52 Id. 648, and note 649.

THE PRINCIPAL CASE IS CITED in *Bell v. Western River Imp. and Wrecking Co.*, 3 Met. (Ky.) 564, to the points contained in the third and fourth paragraphs of *syllabus, supra*.

GAINES'S ADMINISTRATRIX v. POOR.

[3 METCALFE, 508.]

OBLEGOR CANNOT AVOID CONTRACT ON GROUND OF DURESS practiced upon the wife by the husband, they having separated, where the obligor enters into a contract with the husband, to which the wife is not a party, to save him, his heirs and representatives, free from any claim of the wife to maintenance, alimony, or dower, in consideration of a conveyance to him by the husband of certain property in trust for the wife; and the

lapse of seven years after the recovery of dower by the wife does not bar the right of recovery against the obligor.

WIFE'S RIGHT TO ALIMONY AND DOWER IS NOT BARRED by a contract entered into by her husband with another, but to which she is not a party, and by which it is agreed, the husband and wife having separated, that the obligor will save the husband, his heirs or representatives, free from any claim of the wife to maintenance, alimony, or dower, in consideration of the conveyance to him of certain property in trust for the use and benefit of the wife.

COVENANT RUNS WITH LAND, WHERE HUSBAND AND WIFE have separated, and the husband enters into a contract with a third person, who covenants to save the husband, his heirs, and representatives free from any claim of the wife to maintenance, alimony, or dower, in consideration of a conveyance by the husband to him of certain property in trust for the use and benefit of the wife.

CONTRACT BY HUSBAND, MADE BEFORE MARRIAGE, or afterwards when living in amity with his wife, to pay an allowance for her support, if at a future time she should separate from him, is against public policy, and void.

HUSBAND'S CONTRACT TO SUPPORT WIFE IS VALID, if made in contemplation of the continuance of a previous separation, or of an immediate separation, where disagreements have taken place between husband and wife.

TO CREATION OF SEPARATE USE, no particular form of words is necessary. Therefore, though the usual technical words to create a separate use are not employed in a contract, yet when it shows that a separation was intended between husband and wife, and that the property was conveyed to a trustee, in trust for her, in view of such separation, it is clear that a separate use is intended, and the trustee will hold the property for the separate use of the wife.

IT IS NOT ESSENTIAL TO VALIDITY OF CONTRACT BY HUSBAND for the future support of his wife, disagreements having arisen between them, that separation should take place before the execution of the contract, and the testimony of the wife is inadmissible to prove that they had not separated at the time of its execution, or that the conduct of the husband toward her was threatening and violent, in order to procure the execution of such contract.

WHERE PARTIES TAKE UPON THEMSELVES DEFENSE of a suit, after notifying the real defendant of the pendency of the action, they must pay their attorneys' fees.

THE opinion states the facts.

J. T. Goalder, James Harlan, and James Harlan, jun., for the appellant.

Suddarth and Alexander, and Simpson and Scott, for the appellee.

By Court, BULLITT, J. In 1837, serious disagreements having arisen between Thomas Gaines and his wife, a contract was made between said Gaines of the one part, and the appellee Poor, and Jacob Spears as his surety, of the other, in which it was recited that said Gaines and his wife "have separated,

and both desiring to be free from any duty or obligation, or charge to each other, have come to the following agreement, to wit: That hereafter they will live separate and apart from each other, and that as to their estate the following agreement is made: That said Thomas Gaines will convey to Edward Poor, in trust for his said wife, all her wearing apparel," and other property described, and that "the said Catherine agrees to make no claim on said Thomas, or his estate, for maintenance, alimony, or dower, in case she shall survive him;" and by which said Thomas conveyed said wearing apparel and other property to said Poor, "in trust for the use and benefit" of his said wife; and said Poor, and said Spears as his surety, in consideration of said conveyance, bound themselves to said Gaines to save him, his heirs and representatives, free from any claim of Mrs. Gaines for a support during his life, and for alimony, and free from any claim for dower in his estate, real, personal, or mixed.

Gaines and his wife continued to live apart after the making of said contract, and in 1842 she brought a suit against him for alimony, pending which he died. In 1844 she revived the suit against his representatives, and by amended bill claimed dower, and obtained a decree for one hundred and eighty-four dollars and seven cents, being one third of the personal assets of her husband's estate, and recovered dower in two tracts of land, one of which said Thomas Gaines had devised to his son, R. H. Gaines, and the other to his sons Thomas and Francis.

Said R. H. Gaines qualified as executor of said Thomas, and afterward died; and the appellant, Elizabeth A. Gaines, having qualified as his administratrix with the will annexed, and also as administratrix *de bonis non* with the will annexed, of said Thomas, sued said Poor upon his aforesaid contract to recover the value of the dower and personal estate recovered by Mrs. Thomas Gaines, and the costs of Mrs. Thomas Gaines's suit, and the attorney's fees paid in defending the same. There were a verdict and judgment for Poor, from which judgment this appeal was taken.

1. Mrs. Thomas Gaines was not a party to the contract between Thomas Gaines and Poor and Spears. She did not sign it, and it is evident from the contract itself that the parties did not contemplate that she would sign it, although it recites certain agreements between her and her husband. It is the contract of Thomas Gaines with Poor as principal and Spears as surety.

It is well settled that a deed or devise by a stranger, in trust for a married woman, with nothing to indicate that it is for her separate use, will not give her a separate interest. But if the deed or will directs the trustee to collect the rents and profits, and pay them to her, and uses any other language showing that a separate use is intended, the law will carry that intention into effect. In the case before us, though the contract does not employ any of the usual technical words to create a separate use, yet as it shows that a separation was intended between Gaines and his wife, and that the property was conveyed to Poor, in trust for her, in view of such separation, it is clear that a separate use was intended. The property, therefore, was held by Poor for the separate use of Mrs. Gaines.

5. As we have already shown, R. H. Gaines had the right of action so far as the covenant related to the personal estate of Thomas Gaines, and so far as it related to the tract of land devised to himself, and to that extent he had the power to release the right to damages, and if he did so, the appellant had no cause of action.

6. As to the costs and expenses of defending the suit brought by Mrs. Gaines, the appellant has a right to recover the legal costs, unless R. H. Gaines relinquished the right of action, but no right to recover attorney's fees. Thomas and R. H. Gaines having notified Poor of the suit, it was Poor's duty to defend. He would have been liable on his covenant if a greater amount had been recovered by Mrs. Gaines. The defense was a voluntary thing on the part of Thomas and R. H. Gaines, not at the request of Poor, and they must pay their attorney's fees.

7. We have already shown that it is immaterial whether Thomas Gaines and his wife had separated before the execution of the contract or not. Mrs. Gaines's testimony tending to prove that they had not then separated, and her statements as to the conduct of her husband toward her, his threats and violence, in order to procure the execution of the contract, were irrelevant, and may have prejudiced the minds of the jury against the cause of the appellant, and should not have been permitted to go before the jury.

Having stated the principles applicable to the case, it is unnecessary to notice in detail the action of the court below upon the pleadings and instructions.

The judgment is reversed, and the cause remanded for a new trial, and other proceedings consistent with this opinion.

WIFE'S RIGHT TO DOWER, when not barred by agreement of husband: *Higginbotham v. Cornwell*, 56 Am. Dec. 130, and note thereto; *Swaine v. Perine*, 9 Id. 318.

AGREEMENTS FOR OR RESPECTING SEPARATION between husband and wife, validity of: *Rolette v. Rolette*, 40 Am. Dec. 782, and note; *McKennon v. Phillips*, 37 Id. 438; *Sayles v. Sayles*, 53 Id. 208, and note 312.

TO CREATE SEPARATE USE, technical language is not absolutely necessary: *Hamilton v. Bishop*, 29 Am. Dec. 101, and note 103; note to *Smith v. Wells*, 39 Id. 777; *Sanderson v. Jones*, 63 Id. 217; *Bason v. Holt*, 64 Id. 585, and note 587.

THE PRINCIPAL CASE IS CITED IN *Loud v. Loud*, 4 Bush, 460, to the point that a contract by a husband, whilst living in amity with his wife, to pay a given sum as her support in anticipation of future separation, would be against public policy, but not so when made on account of previous separation, or in contemplation of immediate separation.

MATTINGLY'S HEIRS v. READ.

[8 METCALFE, 524.]

IN PROCEEDING TO SELL INFANTS' LANDS under Kentucky statute, commissioner's report must show that the property therein valued is all the real and personal estate belonging to the infant whose land is sought to be sold. Without such report, the sale is void.

SALE OF INFANT'S LAND BY GUARDIAN IS VOID for non-conformity to requirements of law, where the order appointing commissioners directs them to report whether or not such sale would redound to the infant's interest, and they reporting, say that, "in their opinion, a sale of the land and slaves, and a division of the proceeds, would redound to the interest and benefit of such infant;" the law requiring that the guardian "allege his belief that the sale will redound to the benefit of the infant;" and that, before the court shall have jurisdiction to order such sale, the commissioners shall report, under oath, "whether the interest of the infant requires the sale to be made."

UNTIL APPLICATION BY STATUTORY GUARDIAN for sale of infant's lands, the court has no right to appoint commissioners to value the ward's estate.

PETITION in equity. The opinion states the facts.

Sweeney and Taylor, for the appellants.

G. W. Ray, for the appellee.

By Court, STITES, C. J. This was a proceeding to sell infants' lands, had under 2 R. S. (Stanton), c. 86, p. 304.

A sale was made, and Read, one of the purchasers, who refused to give bond for the purchase-money, procured an order setting aside the sale as to him. Of this order, appellants complain.

The grounds relied upon by Read in the circuit court, and upon which the order seems to have been founded, relate

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

CONNELY v. BOURG.

[16 LOUISIANA ANNUAL, 108.]

SURETY WHO PAYS JUDGMENT, and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment in the name of the creditor, for the amount which he has paid as surety.

WHERE DRAWER GIVES TWO INDORSERS as co-sureties, the one that indorses first is liable to the other for the whole debt.

ACCOMMODATION PAPER IS GOVERNED BY SAME RULES as other paper. The first accommodation indorser is liable to the second and subsequent indorsers, the second to the third, and so on to the end of the indorsements.

TO VARY LEGAL LIABILITY OF INDORSERS, strong evidence is required.

RIGHT TO RECOVER COSTS as well as principal and interest of debt, against a first indorser as surety, is transferred to a second indorser by the effect of the legal subrogation, which results from his payment of the debt to the judgment creditor.

THE opinion states the facts.

Connelly and Rightor, for the plaintiff.

F. S. Goode, for the defendant and appellant.

By Court, LAND, J. The holder of a promissory note obtained judgment on the same against the maker, and against G. F. Connelly, the payee, and J. B. Robinson, as indorsers; and issued execution on his judgment against Robinson, the second indorser, who paid the principal and interest, together with costs of suit into the hands of the sheriff.

Subsequently, Robinson caused an *alias writ of fieri facias* to issue on the judgment obtained by the holder of the note,

against G. F. Connely, the first indorser, for the whole amount of the principal, interest, and costs which he had paid to the sheriff.

Thereupon Connely, the first indorser of the note, sued out an injunction to arrest the execution of the writ on the following grounds: 1. That no judgment existed on which any execution could have issued, the payment by said Robinson, one of the obligors, having extinguished the same; 2. That all the indorsors of commercial paper, under the laws of Louisiana, are, as between themselves, joint sureties, and therefore, under no circumstances was said Robinson entitled to claim more than half of said judgment; 3. That there was a conventional agreement that in case of loss by the indorsement, said loss should be jointly borne by the indorsers; 4. That even if Robinson had a right to issue execution for the whole amount of the debt and interest, he had no right to collect from his co-obligor the costs he had himself incurred in resisting the payment of his debt.

The first ground relied on for maintaining the injunction is not tenable. It has been held by this court that a surety who pays a judgment, and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment, in the name of the creditor, for the recovery of the amount which as surety he has paid: *Sprig v. Beaman*, 6 La. 63.

Consequently, by the act of payment every right of the judgment creditor, including the right to issue execution, passed to Robinson by virtue of a legal subrogation both against the maker and first indorser of the note. We say against the maker and first indorser, because the latter indorsed the note for the accommodation of the maker, and is viewed as a surety against whom the rights of the creditor were transferred by the effect of the legal subrogation, as fully as they were against the principal debtor himself: Civ. Code, arts. 2157, 2158. It results from this doctrine that the payment made by Robinson, who was also an accommodation indorser of the note, and as such is likewise viewed as a surety of the maker, did not extinguish the judgment, but the payment is considered in law as a sale to him of all the rights and actions of the judgment creditor: *Scott v. Featherston*, 5 La. Ann. 313.

The second ground relied on for the injunction is also untenable, for it has been held by this court that where a drawer

gives two indorsers as co-sureties, the one that indorses first is liable to the other for the whole debt: *Stone v. Vincent*, 6 Mart., N. S., 518. The well-settled doctrine is, that accommodation paper is governed by the same rules as other paper; and that the first accommodation indorser is liable to the second and subsequent indorsers, and the second to the third, and so on to the end of the indorsements.

In relation to the third ground for the injunction, the testimony establishes that Robinson agreed to indorse the note for the accommodation of the maker, provided that Connely would do the same; and that afterwards Robinson wrote the note payable to the order of Connely, and having indorsed it, delivered it to the maker for his signature, and for the indorsement of the payee. Those facts do not prove an express agreement on the part of Robinson to bear jointly with Connely any part of the loss that might result from the indorsement of the note for the accommodation of the maker. On the contrary, the facts that the note was written payable to the order of Connely, and was made to bear his first indorsement, are strong circumstances in favor of the understanding of Robinson that Connely should become, as his indorsement shows, the first indorser of the note, and should incur the liabilities incident to that relation, although Robinson had first, in point of time, indorsed the note, even before it had been signed by the maker.

Strong evidence is required to vary the legal liability of indorsers as fixed by the *lex mercatoria*, for the effect of such evidence is to modify the rights and obligations of the indorsers in derogation of the law of their written contract, and such evidence has not been adduced by the plaintiff in this case. The fourth ground for the injunction is likewise untenable. The costs which had been incurred in prosecuting the suit on the note to judgment formed a part of the debt which the first indorser, considered as a surety, was bound to pay to the judgment creditor, and the right to recover the costs, as well as the principal and interest of the debt, was transferred to Robinson by the effect of the legal subrogation which resulted from his payment to the judgment creditor. The judgment was, besides, *in solido*, and as such, was for the whole amount of costs against each of the defendants.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be avoided and reversed; and it is now ordered, adjudged, and decreed that the injunction sued out is

this case be dissolved, with five per cent damages on the amount of the judgment enjoined, and that this suit be dismissed at plaintiff's costs in both courts.

SURETY PAYING JUDGMENT AGAINST HIS PRINCIPAL is substituted to the rights of the creditor: *Fleming v. Beaver*, 19 Am. Dec. 629, and note; *Creager v. Brengle*, 9 Id. 516. The surety may recover judgment against his principal: *Pike v. McDonald*, 54 Id. 597, and note 598. The surety is subrogated to all the securities held by the creditor: *Edgerly v. Emerson*, 55 Id. 207; *Eddy v. Traver*, 31 Id. 261; *Cullum v. Emanuel*, 34 Id. 755, and notes to these cases.

FIRST INDORSER IS RESPONSIBLE TO EVERY HOLDER, and to every person whose name is on the note subsequent to his own and who has been compelled to pay the amount of the note: *McNeilly v. Patchin*, 66 Am. Dec. 651, and note 655.

THERE IS NO DIFFERENCE BETWEEN ACCOMMODATION NOTES and those negotiable for value: *Yates v. Donaldson*, 61 Am. Dec. 283; and an indorser of such note is liable over to subsequent indorsers: *Knob v. Dickson*, 23 Id. 488, and note 490; *Pitkin v. Flanagan*, 56 Id. 61, note 68.

SURETY'S RIGHT TO CONTRIBUTION, FOR COSTS AND EXPENSES in defending a suit, exists against co-surety when: See *Fletcher v. Jackson*, 56 Am. Dec. 98, and note 107.

ADMISSIBILITY OF EVIDENCE TO VARY EFFECT OF INDORSEMENT: See *Bright v. Carpenter*, 34 Am. Dec. 432; *Patterson v. Todd*, 57 Id. 622; *Lewis v. Harvey*, 59 Id. 286; *Barclay v. Weaver*, 57 Id. 661, and notes to these cases.

SUCCESSION OF VOGEL.

[16 LOUISIANA ANNUAL, 139.]

SUPPOSED DEATH OCCASIONED BY SHIPWRECK, earthquake, war, plague, explosion, and like perils, is within the exclusive province of the court to determine, by the exercise of a sound discretion, founded on the facts of each particular case.

THE facts are stated in the opinion.

C. Roselius, for the appellant.

By Court, DUFFEL, J. The object of this suit is to obtain the probate of the testament of George Charles William Vogel, on the ground of his alleged death.

It appears from the evidence that Vogel disappeared very suddenly from his usual domicile in the city of New Orleans, on the sixth of January, 1858, without intimating his intention to any one, or making any preparations for a voyage, and it is supposed, without any amount of money, or other clothes than those on his person. He is represented as having been devoted to his wife and three children, regular in his habits, careful of his health, a man of fortune and high moral prin-

ciples. He had, however, of late, been laboring under a depression of mind, produced by the belief of an incoming crisis in the commercial world; he was, at the time, a member of the commercial firm of Schmidt & Co. (of this city), but it does not appear that his state of mind was such as to cause any uneasiness to his family and friends.

The district judge, after a careful review of the facts of the case, rejected the demand. Our learned brother very cogently remarks: "Disappearances such as his are not, unfortunately, of rare occurrence. Like instances are numerous; men apparently as happy in their domestic relations as he was, who in social position, in wealth, in the success of gratified ambition, were his equals, have been known to leave everything which is commonly looked upon as making life dear, to wander off among strangers and perils, and bury themselves for years, without leaving a trace behind them, in places and among people who were strange, and, it would be thought, repulsive to their tastes, their habits, and repugnant to those principles of honor and virtue which are the foundations of an honest domestic society."

It is contended by the learned counsel of the appellant that the general features of our code, under the title of absentees, were taken from the Napoleon code under the same title, and that the case at bar does not come within the scope of either.

While we admit the great similarity of the two systems, we think that they were nevertheless intended to govern, primarily, all cases of absence, by sudden disappearance or otherwise; unless, and this is the exception, the disappearance be of such a character as to force on the mind the irresistible conviction of death. Such, for instance, as a supposed loss by reason of a shipwreck, an earthquake, a war, a plague, an explosion, and like perils. And it is essentially within the exclusive province of the judge to draw the line of distinction, by the exercise of a sound discretion, founded on the facts of each particular case.

We were not referred to any adjudged case, to the point, in France, and we have been unable, in our researches, to find a parallel in the *Journal du Palais*; but we know that none such exist in our state reports.

The principle contended for would, if sanctioned, be demoralizing in its effects, and tend directly to relax family ties.

The vast extent of our territory, the unbounded freedom of ingress and egress, and the characteristic propensity of our

race for exploration, novelty, and the acquisitions of wealth, fame, and science, must have their weight in determining cases of absence by sudden disappearance; and when viewed in the above aspect, we cannot bring our mind to the irresistible conviction, from the facts disclosed, that the disappearance of Mr. Vogel can only be attributed to an untimely end.

For the reasons assigned, the judgment of the court *a qua* is affirmed.

RULE FOR DETERMINING DEATH FROM ABSENCE: See *Ashbury v. Sanders*, 68 Am. Dec. 300, and note 303.

BRENT, SON, & Co. v. SHOUSE—TWYMAN, GOODLOE, & HOSKINS, INTERVENORS.

[16 LOUISIANA ANNUAL, 153.]

VENDOR'S PRIVILEGE ON MOVABLES SECURED BY ATTACHMENT is unknown to common law. Such privilege does not apply to contracts made in another state, where it is shown that the common law is the basis of jurisprudence, and that the parties reside in such other state. The fact that a portion of the goods conveyed was, at the date of the contract, in Louisiana, makes no difference, movables, as a general rule, having no *situs*.

THE opinion states the facts.

G. P. McPheeters, for the plaintiffs and appellants.

C. A. Taylor and T. H. Kennedy, for the defendants.

By Court, DUFFEL, J. The parties to this suit were before us last year, on an appeal from the following judgment: "In this case, for the reasons assigned in the written opinion of the court this day delivered and on file, it is ordered, adjudged, and decreed that the plaintiffs' petition be dismissed; that the attachment herein issued be dissolved; that the intervention herein filed by J. W. Twyman, J. R. Goodloe, and J. E. Hoskins be maintained; and that the property attached be delivered to them, and that plaintiffs pay all costs of suit." This judgment was affirmed, with the single reservation, "of the rights of the plaintiffs, as creditors with the vendor's privilege:" See reported case, 15 La. Ann. 110.

The debt of the plaintiffs having matured, they renewed their action by attachment, citing all the parties to the original suit.

As the plaintiffs avowedly prosecute this action by reason of

the reservation made in our former decree, a recovery must necessarily depend on the proof of a privilege.

All the parties in interest reside in the state of Kentucky, and the sale of the movables herein attached was made in the place of their domicile.

The privilege claimed by the plaintiffs must, therefore, result from the laws of Kentucky, for the vendor's privilege, recognized under our code, does not apply to such a case.

The fact that a portion of the goods conveyed was, at the date of the contract, in New Orleans, does not alter the case, for, as a general rule, movables have no *situs*.

Now, it is in evidence that the common law is the basis of the jurisprudence of Kentucky, and we all know that the vendor's privilege on movables is unknown to the common law: Civ. Code, 10; *Whiston v. Stodder*, 8 Mart. 98 [13 Am. Dec. 281]; *Colt v. O'Callaghan*, 2 La. Ann. 984; *Copley v. Sanford*, Id. 335 [46 Am. Dec. 548]; Hennen's Dig., p. 1070, No. 28.

The case of *Beirne v. Patton*, 17 La. 589, is an exception to the general rule that movables have no locality, and has no application to the case at bar, for in that case the plaintiffs were citizens of this state, pursuing rights created in the state, while here they are all citizens of another state, attempting to enforce obligations and contracts created in their own state.

We therefore conclude that the district judge properly rejected the claim of the plaintiffs, but erred in condemning them to pay five per cent per annum interest on the amount attached in the hands of the garnishees, as also two hundred dollars counsel's fees. We do not think that this is a proper case for damages; it is not a case of injunction; the plaintiffs are not in possession of the funds attached, and they litigated their pretensions under a decree of this court.

It is therefore ordered, adjudged, and decreed that the five per cent per annum interest, and the two hundred dollars allowed by the judgment of the district court, be rejected, and that the judgment, amended as above, be affirmed, the appellees paying costs of appeal.

LEX LOCI CONTRACTUS, WHEN GOVERNS: See *Wyse v. Dandridge*, 72 Am. Dec. 149; *Born v. Shaw*, Id. 633, and notes to these cases; also *Everett v. Herrin*, 74 Id. 455, and note; *French v. Hall*, 32 Id. 341, showing by what law attachment proceedings are governed; see also *Molyneux v. Seymour, Fanning, & Co.*, 76 Id. 662, holding that personal property has no *situs*; also *McKwaine & Speigel v. Legare*, 36 La. Ann. 363, distinguishing the principal case.

PRENDERGAST v. PRENDERGAST.

[16 LOUISIANA ANNUAL, 219.]

NUNCUPATIVE WILLS MUST, under articles 1574 and 1575, civil code of Louisiana, be dictated by the testator; or in the absence of such dictation, he must present the instrument which he has caused to be written, and declare that it contains his last intentions. The word "dictation" is used in a technical sense, and means to pronounce orally what is destined to be written at the same time by another.

IN CASE OF NUNCUPATIVE WILL BY PRIVATE ACT, in Louisiana, nothing can be taken by implication. If the law requires a technical dictation in such case, there must be a strict compliance. Nor would the court be justified in presuming a compliance.

NUNCUPATIVE WILL BY PRIVATE ACT cannot be annulled on the ground that it was written in the presence of the witnesses. It will suffice to comply with some formality in their absence, *a fortiori* in their presence. The presence of witnesses is intended as a sanction to the proceedings, and cannot invalidate them in any contingency.

NUNCUPATIVE WILL BY PRIVATE ACT IS VALID, where the testator caused his will to be written by one of the subscribing witnesses, and presented it to them as his last will, declaring that it contained his last intention.

THE opinion states the facts.

New and Burke, for the plaintiff and appellant.

Dunn and Herron, for the defendant.

By Court, VOORHIES, J. The validity of the last will of Thomas Prendergast, deceased, must be tested under the provisions of articles 1574 and 1575 of the civil code.

These articles lay down the rules regulating the forms or formalities to be observed in making a nuncupative will by private act; and the second paragraph of the latter provides that "this testament is subject to no other formality than those prescribed by this and the preceding article:" *Graves v. Graves*, 10 La. Ann. 212.

The questions raised in this cause relate to the dictation of the will, and its presentation by the testator, accompanied by the declaration that the instrument contains his last intentions.

The first question is, whether a nuncupative will by private act, which is not written by the testator, must, in all cases, be received under his dictation. This must be answered affirmatively for all cases arising under the first paragraph of article 1574; and negatively under the second paragraph. The former uses the expression "from his dictation;" and the latter, "caused it to be written."

It is true that article 1568 lays down the general rule that nuncupative testaments, which are not written by the testator himself, must be made under his dictation. But as stated above, nuncupative testaments by private act, made under the second clause of article 1574, are specially excepted from the operation of the general rule by the last clause of the subsequent article.

The testator must, therefore, either dictate his will, or in the absence of such dictation, he must present the instrument which he has caused to be written, and declare that it contains his last intentions. In other words, this presentation and declaration, which is unnecessary when the will is dictated, is intended to supply the want of dictation. This results from the very terms of the two paragraphs of the article.

There is a manifest difference between dictating a will and causing it to be written.

Dictation is used in a technical sense, and means to pronounce orally what is destined to be written at the same time by another. Such is the settled definition of this term under our jurisprudence.

But when the code, after providing in what cases there must be a dictation, goes on stating that it will suffice if, upon complying with some additional formality, the testator causes the instrument to be written by another person, it is obvious that the purpose is to dispense with the technical dictation. For not only is the technical expression omitted, and words of ordinary import substituted, but, in other passages, the law-giver uses in this connection such expressions as, "caused it to be committed to writing," "written by another under his direction," etc.: Civ. Code, 1569, 1642. And if it be true that in these terms there should be no difference, then the second paragraph of the article 1574 is mere tautology, with one reservation which, of itself, however, is sufficient to show the fallacy of such premises. That reservation would be that, although it be imperative that the will be dictated, yet the testator might make the dictation in the absence of the witnesses to one whose agency may remain entirely unknown.

If the law requires a technical dictation, there must be a strict compliance. Nor would the courts be justified in presuming a compliance; for in nuncupative wills by private act, nothing can be taken by implication: Civ. Code, 1640, 1641; Code Pr. 930, 933.

To require a dictation in the absence of the witnesses is an

anomaly; and the law, so construed, would contain in its bosom the germ of its own destruction.

Rules of construction are resorted to for the purpose of giving effect to the law, and not with the view of rendering it nugatory. In the case of *De Bardelabon v. Awerret*, 11 La. Ann. 636, the court said: "The nuncupative will, by public act, must be dictated by the testator and written by the notary as dictated; and if under private signature, it may be written by himself or another; but when written by another person, it must be from his dictation, or he must have caused it to be written in substance and in form as he presents it, declaring it to contain his last will, *ses dernières volontés*." The distinction is there precisely made; the testator must either dictate the will, or he must cause it to be written; but if he resorts to the latter mode, he must, as he presents the instrument, declare that it contains his last intentions.

Such is the doctrine of the code; and it is to be regretted that the ruling in the above-quoted case was not adhered to in the case of *Bordelon v. Baron*, 11 La. Ann. 676, subsequently decided at Alexandria. In the latter, the court held a dictation to be always indispensable under article 1568, without even noticing the exception introduced by the second paragraph of article 1575: See the case of *Graves v. Graves*, 10 Id. 212.

We now come to another question, somewhat connected with the previous discussion, and which has never been heretofore presented to our courts.

The article says that it will suffice if the testator causes the will to be written out of the presence of the witnesses, and it is contended that although the instrument be in all other respects regular, if it has been written in their presence, it is null and void for non-compliance, in this respect, with the letter and spirit of the law.

This doctrine is untenable. A will cannot be annulled on the ground that all the formalities were carried on in the presence of the witnesses. If it will suffice to comply with some formality in their absence, *a fortiori* in their presence. The attendance of witnesses is intended as a sanction to the proceedings, and cannot invalidate them in any contingency: Civ. Code, 1642.

Six witnesses signed the will of Thomas Prendergast, deceased. By their testimony, taken down for the homologation, it appeared that this instrument, which the testator had caused

to be written by one of the subscribing witnesses, was duly presented as such with the required declaration. There was, however, a conflict in the testimony of the same witnesses, when they were examined during the trial of this cause. Three of them, however, fully corroborated the former depositions upon the probate of the will: Code Pr. 943.

The same rules of evidence apply in this respect as in other cases, subject to the exception introduced by articles 1641 of the civil code, and 933 of the code practice; and the weight of evidence is left to the appreciation of the judge.

There is sufficient proof in the record that the testator caused his will to be written by one of the subscribing witnesses, and that the former presented the instrument to them as his last will, declaring that it contained his last intentions. The objections raised to its validity are therefore unfounded.

Judgment affirmed.

MERRICK, C. J., filed a dissenting opinion.

NUNCUPATIVE WILLS, WHAT NECESSARY TO VALIDITY OF: See extended notes to *Sykes v. Sykes*, 20 Am. Dec. 44, and *Guthrie v. Owen*, 36 Id. 316-322; also *Dorsey v. Sheppard*, 37 Id. 77.

WHEN TESTATOR HAS CAUSED HIS WILL to be written, whether in the presence of witnesses or in their absence, and has presented the instrument to them, declaring that it contains his last intentions, this is a full compliance with article 1574 of the civil code: *Succession of Morales*, 16 La. Ann. 268. Such presentation and declaration admit, supply, or dispense with formal dictation: *Wood v. Roane*, 35 Id. 868, both citing with approval the principal case.

PETERS v. NEW ORLEANS, JACKSON, AND GREAT NORTHERN RAILROAD COMPANY.

[16 LOUISIANA ANNUAL, 222.]

RAILROAD COMPANY UNDERTAKING TO TRANSPORT LIVE-STOCK is bound to furnish suitable and safe cars, and is responsible for any loss arising from a neglect of duty in this particular. The mere presence of the owner of the stock does not lessen this responsibility, as the cars are necessarily under the control of the agents of the company.

THE opinion contains the facts.

H. Duncan and P. Childress, for the plaintiff.

Michel and Koontz, for the defendants and appellants.

By Court, **MERRICK, C. J.** This suit is brought to recover damages for the loss of forty-four head of horned cattle, killed by being deprived of air in a closed car during their transportation from Amite city to New Orleans, on the railroad of defendants.

It appears that the railroad company have open cars, made expressly for transportation of cattle. They also occasionally carry them in what are called box-cars, but it is customary to leave the doors of such cars open, and to secure the openings so made by nailing slats across the same.

The company carry cattle for so much per head; if the consignor or owner prefer, they hire the car at so much per trip. If the latter mode (which is the least expensive) is adopted by the owner, he has permission to put on the car as many cattle as he can, provided it be not, in the opinion of the conductor, overloaded, and he travels passage free, in order to take care of the cattle.

The day before the cattle were shipped, the agent at Amite city sent to the master of transportation in New Orleans for cars for their transportation. Instead of sending cattle-cars, box-cars were sent to Amite city for that purpose.

The plaintiff's cattle, by the assistance of his hands and those belonging to the defendants, were put in a box-car on the day they were to be brought to New Orleans. The plaintiff offered to nail slats across the openings of the doors, but the agent of the company objected to the same, as he said, for want of time. Some discussion then took place as to the danger of shutting the doors of the cars, but the agent, being of the opinion that the cattle could go safely to the next station, locked the doors, and instructed the conductor to open the car at the next station, and give the cattle air, or they would die. When the train arrived at Tickfaw, the next station, no key could be found with which to open the doors; and it proceeded to Ponchatoula. Here, according to plaintiff's witness (to whose testimony credence was given by the district judge), an attempt was made to force open the doors of the car with a bar of iron, in order to admit air, but after one or two unsuccessful efforts, it was abandoned.

The conductor says he offered to some one of those shipping cattle that trip to put out those in the box-car at this station, and bring them to the city the next day, but his offer was refused.

He also says a consultation was held at Frenier, forty-

eight miles distant from Amite city, he thinks, with the plaintiff and a Mr. Woods, and it was concluded not to open the car. At this time, he says, judging from the noise, the cattle were "full of life." But he is partially contradicted by the witnesses Woods and Adams, who say that the cattle seemed to be dead at Ponchatoula, and they heard no noise from them afterwards.

On the arrival of the train in the city, the car was opened by an agent of the company, and the cattle were found dead, with the exception of three or four calves.

It was contended in the lower court that the plaintiff was the charterer of the car, and having a right to load the car in his own way, was subject to the risk of all accidents to his property while being transported by the company.

It appears to us, however, that the defendant stood in the relation of the common carrier to the plaintiff, except so far as that relationship had been modified by the agreement in this case.

The defendant undertook to transport for the plaintiff a carload of live-stock, for the sum of twenty-two dollars and fifty cents freight. The company was bound to furnish a suitable and safe car, and it is responsible for any loss arising from the neglect of duty in this particular, and the mere presence of the owner does not lessen this responsibility, for he had no power over the train, no right to make any change in the disposition of the cars, which were necessarily under the control of the agents of the company: See 1 Parsons on Maritime Law, 122; Angell on Carriers, Nos. 161, 162, 165.

The proof shows that the plaintiff offered to nail slats across the doors, but the privilege was refused him. There can, therefore, be no pretense for the assertion that the plaintiff assumed the risk of the transportation of his cattle in the box-car. No such agreement has been proved.

It is therefore ordered, adjudged, and decreed by the court that the judgment of the lower court be affirmed, with costs.

RAILROAD COMPANY, LIABILITY OF, when undertaking to transport live-stock: See *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 567; *Percell v. Penn. R. R. Co.*, 75 Id. 564.

FELLOWS v. STEAMER R. W. POWELL.

[16 LOUISIANA ANNUAL, 316.]

MASTER OF SHIP OR OTHER VESSEL has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel. The owners of the vessel are not therefore responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.

THE opinion states the facts.

Mott and Fraser, for the plaintiff.

Lee and Marr, for the defendants and appellants.

By Court, LAND, J. The plaintiff, a merchant at Camden, in Arkansas, instituted this suit against the owners of the steamer R. W. Powell, to recover the value of twelve bales of cotton, which he alleges he shipped on board said boat at Camden, consigned for sale to Fellows & Co., of this city, but which were not delivered to the consignees, and have been lost to him.

It appears from the evidence that on a trip of the R. W. Powell to Camden, the clerk of the boat, being at the counting-house of the plaintiff, signed a bill of lading for the cotton which at the time had not been delivered on board the boat, but was at the warehouse of E. Hill & Co. at that place, with the understanding that the master of the boat would land at the warehouse and take on board the cotton for which the bill of lading had been signed and delivered to the plaintiff. It further appears that the master of the boat landed at the warehouse of E. Hill & Co. in the night-time, for the purpose of taking on board the cotton; but that it could not be found after a search by the clerk of the boat and by the shipping-clerk of E. Hill & Co. (a large quantity of cotton being at the time around and in the warehouse); and that the R. W. Powell proceeded on her trip to this city without the cotton. And it further appears that within a few days afterwards the cotton was destroyed by fire in the warehouse of E. Hill & Co.

Upon these facts, the question arises whether the owners of the boat are liable for the value of the cotton, on the bill of lading signed and delivered to the plaintiff.

The master of the boat acted through his clerk, as the agent of the owners, and whether they are bound by the bill of lading, depends on the question whether the master had authority to bind the owners for the delivery of the cotton before it was actually delivered to him.

It has been held, both in England and in this country, that

the master of a ship or other vessel has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and that for the want of such authority, the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board: See *Grant v. Norway*, 2 Eng. L. & Eq. 337; *Schooner Freeman v. Buckingham*, 18 How. 188.

This doctrine meets with our approval; and its application to this case defeats the plaintiff's action.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of the defendants, with costs in both courts.

VOORHIES, J., did not sit in this case.

BILL OF LADING DOES NOT ESTOP SHIP-OWNER from showing that there was no goods shipped: See extended note to *Chandler v. Sprague*, 38 Am. Dec. 410, citing the principal case; see also *Rowley v. Bigelow*, 23 Id. 607; *Farmers' etc. Bank v. Champlain T. Co.*, 56 Id. 68.

THE PRINCIPAL CASE IS CITED IN *Hunt & Macaulay v. Mississippi C. R. R. Co.*, 29 La. Ann. 454, to the point that the master of a vessel cannot bind the owner by signing bills of lading, unless the goods are actually delivered or put on board.

NEW ORLEANS CANAL AND BANKING Co. v. BEARD—MRS. KLEIN, INTERVENOR.

[16 LOUISIANA ANNUAL, 245.]

INTERVENORS HAVING DIRECT LEGAL INTEREST in the success of defendant, in defeating plaintiff's suit by attachment, have the right to join in all defenses pleaded by defendants *curator ad hoc*, including the plea of prescription when defendant is insolvent.

CHANGE OF RESIDENCE, OPENLY AND PUBLICLY MADE from one part or state of our common country to that of another, cannot be considered as act on the part of the debtor which suspends prescription, and creates a proper case for the application of the maxim, *Contra non valentem agere non currit prescriptio*; and the fact of his pecuniary embarrassments, at the time of such removal, does not *per se* vary the case.

THE opinion states the facts.

Hyams, Labatt, and Jonas, for the plaintiff.

McPheeters, for the intervenor and appellant.

Flower, for the *curator ad hoc*.

By Court, LAND, J. This suit was commenced by attachment on the tenth of March, 1860, against the defendant on two promissory notes which became due and exigible in the year 1849. The defendant being a non-resident, a *curator ad hoc* was appointed by the court to represent him in the defense of the suit; and he pleaded to the action a general denial, and the prescription of five years.

Afterwards, the Louisiana State Bank and one Esther Klein filed separate interventions in the suit, and joined the *curator ad hoc* in his defense to the action, on the grounds that they were the judgment creditors of the defendant, and had an interest in defeating the plaintiff's demand, for the reason that the defendant was insolvent, and had no other property except that seized by the sheriff under the writ of attachment sued out by the plaintiff; and in their separate interventions prayed that the plaintiff's claim be rejected, and that their judgments be satisfied by preference out of the proceeds of the property seized by the sheriff under the plaintiff's writ of attachment.

To the interventions thus filed, the plaintiff excepted, on the ground that the intervenors had no such direct interest in the property seized, either as owners or creditors by mortgage or privilege, or otherwise, as authorized an interference on their part in the suit by way of intervention.

The plaintiff's exception was sustained, and the interventions were dismissed. The plea of prescription was held to be no bar to the action on the evidence adduced; and judgment was rendered against the defendant on the promissory note, with recognition of privilege on the property attached.

The first question for our decision is, whether the exception to the interventions was properly sustained. The code of practice declares an intervention to be a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; and it further declares that in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit: See arts. 389, 390.

Whether the exception was properly sustained depends upon the question whether the intervenors had a direct and legal interest in the success of the defendant in defeating the plaintiff's suit by attachment.

The exception admitted the truth of the allegations con-

The judgment of the lower court on the exception to the intervention of the Louisiana State Bank cannot be disturbed, for the reason the bank has not appealed; and as Mrs. Klein, who has appealed, merely joined the defendant in the defense of the action, a judgment in his favor disposes of her intervention, and she is left to pursue her remedy against the property of the defendant seized under the execution issued on her judgment.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court dismissing the intervention filed in this case by Mrs. Klein be reversed; and it is further ordered, adjudged, and decreed that the judgment of the lower court, in favor of the plaintiff on the merits of the case, be avoided and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of the defendant, with costs in both courts.

VOORHIES, J., absent.

INTERVENORS, RIGHTS OF, and what interest must have in matter in litigation: See *Brown v. Saul*, 16 Am. Dec. 175, and extended note 177; *Hera v. Volcano Water Co.*, 73 Id. 569, and note 573.

HEIRS OF DAVID v. CITY OF NEW ORLEANS. LIVAUDAIS v. CITY OF NEW ORLEANS.

[16 LOUISIANA ANNUAL, 404.]

INTENTION TO DEDICATE TO PUBLIC USE must be signified in a manner not liable to doubt or misconstruction, by something more than symbols of uncertain import or fanciful adornments with which it has pleased a draughtsman to decorate a plan of property.

RULE FOR TESTING DEDICATION TO PUBLIC USE, to be inferred from a plan, is, that words indicative of an intention to give should be found on the plan, in order to clothe it with such an effect, and moreover, that the public should have accepted the dedication by using the ground for the purposes indicated.

IN DEDICATING LAND TO PUBLIC USE, NO PARTICULAR FORM OR CEREMONY is necessary. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation.

DEDICATION TO PUBLIC USE AS HIGHWAY is not fulfilled by converting the land into a site for a market.

MARKET-HOUSE IS NOT NECESSARILY PUBLIC PROPERTY, but may be the subject of private ownership.

DEDICATION TO PUBLIC USE is not established where neither an original grant, nor any act of plaintiffs or of their grantors equivalent to a grant,

of the *locus in quo*, for a public highway, is proved, and the assent of the owner of the land, and its acceptance and use for the purposes of the dedication, is not shown.

THE opinion states the facts.

P. Soule and J. Seghers, for the plaintiffs.

J. J. Michel and Villere, for the defendants and appellants.

By Court, BUCHANAN, J. In the year 1807, Livaudais and Robin, owners of two adjoining tracts of land above the city of New Orleans, fronting on the Mississippi river, laid out their land into squares of town lots, intersected by streets, under the name of Faubourg-of-the-Annunciation, and offered the lots for sale, according to a plan made by Lafon, a civil engineer, deposited in the office of a notary public, with an act of deposit signed by them. The land embraced in this plan now constitutes a portion of the first district of the city of New Orleans. The plaintiffs in these two consolidated suits are the heirs of the original proprietors of the Faubourg Annunciation, Livaudais and Robin, and bring their petitory actions against the city, claiming two portions of ground of one hundred and twenty feet square each, situated the one in square 93 and the other in square 94, of Lafon's plan of the Faubourg, at the junction of Melpomene street and Dryades avenue (Cours des Dryades). Those portions of ground have been taken possession of by the city, which has erected a market-house upon the same, from which it derives a considerable revenue.

The defendant pleads in defense of the action, that the property claimed by plaintiffs is a public place, and part of a public highway; that the same was so designated in the original plan of the Faubourg; and by the acts of those under whom the plaintiffs claim title, the same was dedicated to public use forever.

It was admitted on trial that the capacity of petitioners and their titles are as recited in the petition. It was also admitted that, on the property in dispute, there exists a public market; that said market was built by Patrick Irwin, by agreement with the Second Municipality; that the agreement was, that Irwin was to enjoy the revenue of said market for eight years, at the expiration of which time he should deliver the market to the corporation, upon receiving one half of his original expenditure for the construction of the market; that this term has expired; that the city paid Mr. Irwin eight thousand dollars, or thereabout; and that plaintiffs notified the Second

Municipality, at the time the market was erected, of their claim to be proprietors of the property now in dispute.

Under these pleadings and admissions, it is seen that the question is purely and simply one of dedication to public use, as a highway or street. The evidence of such dedication is supposed, by defendant's counsel, to be found in certain dots or points, which, on Lafon's plan, extend in two parallel rows along the east side of Dryades avenue, until they reach, severally, a point in the squares 93 and 94, one hundred and twenty feet distant from Melpomene street; where the said row of dots diverge at right angles from the general line of Dryades avenue, to a distance of one hundred and twenty feet; and then, turning again at right angles, strike Melpomene street at the distance of one hundred and twenty feet from Dryades avenue. No words written upon the plan indicate the meaning of these recesses of one hundred and twenty feet square, in the adjacent corners of squares 93 and 94. Those recesses lie without the general line of the street upon which is written in the plan "Cours des Dryades."

Two civil engineers have been offered by defendants as witnesses to explain the meaning of the plan of Lafon, in reference to the dedication alleged. Those witnesses differ in their interpretation of the plan. One of them, L. H. Pilié, the city surveyor, testifies that "he considers the piece of ground on which the market is built as part of Dryades street, for the reason that on Dryades street there are points indicating trees, and that that line of trees continued all around this piece of ground."

"His opinion is, that the piece of ground on which the market lies is part of the Cours des Dryades, and of Melpomene street."

The other engineer, Mr. Buisson, "being asked if, from the plan before them, he could consider the space on which is built the Dryades market as being included in the Cours des Dryades, answered, 'There is no such designation on the plan.'"

"This piece of ground is not indicated on the plan as a public place, for want of the indications which the others have." (The witness had previously stated that there are but two public squares marked on the plan—the Place de l'Annonciation and the Place du Marché.)

"Being asked if, by examining the plan, he could not declare that that portion of ground on which the market is built is not a portion of the Cours des Dryades, he answered, 'There is no indication that it is.'"

In this conflict of the opinions of professional draughtsmen and surveyors, it would, we think, be unsafe to infer an intention on the part of the authors of the plan of the Faubourg Annunciation to create a public place at the junction of Melpomene and Dryades streets, composed of fractions of the adjacent squares numbers 93 and 94, from the sole fact that a line of dots, probably representing trees, is depicted on the plan, as retreating from the general course of Dryades street at this particular point. The authorities upon the question of dedication of individual property to public use seem to require something more definite and precise than the proof of dedication offered by the defendant in this case.

In another case of a similar character to this, growing out of the same plan of Lafon, Judge Martin held that evidence was inadmissible to show the meaning attached by Livaudais to a word written upon this plan ("Colisée"), which was claimed as evidencing a dedication to public use. But in the present case, no words are written upon that portion of the plan which represents the land now in dispute. That land is certainly out of the general lines of any street. It is not designated as a public square, or place; but we are called upon to declare it to be such, upon the strength of an ornamental border of dots or points, which may or may not have been intended to designate trees; for this is entirely conjectural, there being no evidence to show the meaning of the author of the plan; even supposing that such evidence could have been admitted under the ruling of Judge Martin, in the case of *Livaudais v. Municipality No. 2*, 16 La. 509, above quoted. In the same case, page 513, the court says:

"There is no evidence of the alleged dedication, out of the plan in this case; and none in the plan, out of the word 'Colisium.' In this same plan is marked a *locus publicus*, called *La place de l'Annonciation*, in the middle of which is a spot designated as a place for a church."

The doctrine of the case quoted evidently is, that the intention to dedicate to public use must be signified in a manner not liable to doubt or misconstruction, by something more than symbols of uncertain import or fanciful adornments with which it has pleased a draughtsman to decorate a plan of property. *Nemo presumitur donare.*

Again, in the great case of *Municipality No. 2 v. Orleans Cotton-press Company*, 18 La. 244 [36 Am. Dec. 624], the organ of the majority of the court, in the decision rendered, laid

down a clear and precise rule for testing a dedication to public use, to be inferred from a plan. The court held that words indicative of an intention to give should be found on the plan, in order to clothe it with such an effect; and moreover, that the public should have accepted the dedication by using the ground for the purposes indicated. The court assumed that words of dedication must have been used in the plan which was the subject of the decision of the supreme court of the United States, in *Cincinnati v. White*, 6 Pet. 432, and quoted with approbation the following decision in that case:

"No particular form or ceremony is necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation."

Having examined already the form of the inferential grant or dedication in this case, let us next inquire what are the facts disclosed by the record in relation to the two essentials, under the high authorities just quoted: 1. The assent of the owner of the land; 2. The acceptance and use by the public according to the purposes of the dedication. Upon the first point, it is admitted of record, that simultaneously with the first move on the part of the city authorities towards taking possession of the land in controversy, they were warned by the plaintiffs that the latter claimed the land as their property. And against this, there is no offer to show, as was done in the case of *Sarpy v. Municipality No. 2*, 9 La. Ann. 597 [61 Am. Dec. 221], that the plaintiffs, or the authors of their title, had sold lots bounded by these premises as a public place.

Upon the second point, there is no evidence that defendants ever used the premises in contest as a public highway, the purpose to which their answer alleges that they were dedicated. On the contrary, the first use made of this land was to lease it to an individual for the purpose of building a market-house, of which the emoluments were received by the lessee during the term of the lease, and subsequently by the corporation as a branch of its revenues. A dedication to public use as a highway was surely not fulfilled by converting this land into a site for a market.

In two cases, *David v. Municipality No. 2*, decided in December, 1853, and not reported, and in *Heirs of Guillotte v. City of New Orleans*, decided in November, 1856, also not reported, it was expressly held that a market-house is not necessarily public property, but may be the object of individual

ownership. It is a place to which the public have free admission for the purpose of purchasing provisions. But the right of selling them is not free to the public at large. That right is usually reserved to a limited number, for a rent paid.

So far from being a public place, a market may be one of the most profitable investments for capital, if we may judge from the market erected on this very land—a market which cost the city, as the evidence shows, eight thousand dollars, and is now farmed out by the city at twelve thousand five hundred dollars a year.

The original ownership of the land being established, and admitted to have been in the plaintiffs, it was incumbent on defendant to show that such ownership had been divested. This he has failed to do. The proof does not make out either an original grant, or any act of plaintiffs or of their authors equivalent to a grant, of the *locus in quo* for a public highway; neither is the assent of the owner of the land proved, nor the acceptance and use by the city for the purposes of the dedication pleaded by them. We therefore conclude that the evidence is insufficient to show the dedication; and were this otherwise, the city forfeited the same by misuser.

Judgment affirmed, with costs.

MERRICK, C. J., filed a dissenting opinion.

WHAT IS SUFFICIENT EVIDENCE of owner's intention to make dedication, from plans furnished and acts done: *Sarpy v. Municipality No. 2*, 61 Am. Dec. 221, and note 226.

ACCEPTANCE OF DEDICATION may be presumed from facts and circumstances: *Cole v. Sprowl*, 56 Am. Dec. 696, and note 702; *Hobbs v. Lowell*, 31 Id. 145.

TO EFFECT DEDICATION, no particular form or ceremony is necessary: *Dummer v. Selectmen of Jersey City*, 40 Am. Dec. 213; *Cole v. Sprowl*, 56 Id. 696, and notes to these cases. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation: *Rector v. Hartt*, 41 Id. 650; *Vick v. Mayor etc. of Vicksburg*, 31 Id. 167; *Warren v. President etc. of Jacksonville*, 58 Id. 610, and notes to these cases.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

INHABITANTS OF READFIELD v. SHAVER.

[50 MAINE, 34.]

VERDICT WILL NOT BE SET ASIDE merely because evidence on question submitted to the jury is not in harmony one portion with another.

SURETY WHO SIGNS TOWN COLLECTOR'S BOND ON CONDITION THAT IT SHALL BE SIGNED BY ALL whose names have been accepted by the town as sureties, otherwise the bond should not be delivered, will not be liable on such bond, if all do not sign it, unless he subsequently waives the condition. But if without such condition he signs the bond to indemnify the town, and the bond is left to be delivered and used for that purpose, and is so delivered, he will be bound, notwithstanding he may have expected when he signed it that all whose names were accepted by the town would become sureties.

PARTY EXECUTING INSTRUMENT CREATING LIABILITY IS ORDINARILY PRESUMED TO KNOW ITS CONTENTS, if no fraud is practiced upon him.

IF SURETY SIGNS BOND OF COLLECTOR AFTER ERASURE OF ONE OF NAMES accepted as sureties by the town, it is immaterial whether he knew of such erasure or not, if he did not annex to his signing the condition that the bond was not to be delivered until all those accepted by the town should sign.

NEGLECT OF TOWN OFFICERS TO ENFORCE COLLECTION OF TAXES, and their payment over by the collector, or to take the tax bills from him, does not release the sureties on his official bond.

WHERE COLLECTOR FOR TWO SUCCESSIVE YEARS PROVES TO BE DEFAULTER at the end of the second year, he had the right at the time he made payments to the town to have appropriated them to either year; if he then failed to have them appropriated, the town might have had them appropriated as they desired; but if neither party made any appropriation, the law will appropriate such payments to the oldest debts, although by so doing the whole deficit be made to fall on the second year.

WHERE COLLECTOR FOR TWO SUCCESSIVE YEARS, AND SURETIES ON HIS BOND for the second year of his term of office, are sued for an alleged

default of such collector, it rests upon the defendants to show what part of the deficit belonged to each year.

MISTAKE MADE BY CLERK IN PREPARING BLANK VERDICT FOR JURY in the christian name of one of the defendants may be corrected by the court after the return of the verdict, so as to make it conform to the writ and other papers in the case, the jury being present, and approving the verdict as amended.

ACTION on the bond of Henry J. Shaver, collector of taxes in the town of Readfield for the year 1857, as principal, and Asa Gile and others as sureties. When the case was given to the jury, the clerk gave them a blank verdict in which was written at the beginning, "Inhabitants of Readfield v. William J. Shaver et als." The jury were in their room when the court adjourned, and they sealed up their verdict, and handed it into court the next morning. Before they left their seats the clerk discovered the error, and the court allowed the verdict to be amended by striking out the word "William" and inserting "Henry," this being in conformity with the writ and docket. The jury, before separating, again affirmed the verdict as amended. The other facts are stated in the opinion.

Voss and Voss, for the plaintiffs.

J. Baker, for the defendants.

By Court, TENNEY, C. J. This suit is upon a sealed instrument, purporting to be the official bond of Henry J. Shaver, as the collector of taxes of the town of Readfield for the municipal year 1857, and his sureties. The sureties deny their liability, on the ground that they consented to be the sureties of the collector solely on the condition that the bond should be executed by those whose names appear thereon, together with Moses Whittier, who refused to become a party, after his name had been inserted in the body of the bond by the scrivener who drew the instrument, the said Whittier and the other persons whose names were inserted having been deemed sufficient by the town, expressed by a vote in open town meeting.

Evidence was introduced to show that after the principal and three of the sureties had signed their names, on its being ascertained that Whittier declined to place his name upon the bond as a surety, his name was erased from the body thereof, and subsequently the other sureties added their signatures.

The great questions in the case were whether the sureties, who executed the bond before the erasure of the name of Whittier, had consented to be holden by word or act, or both,

after they had been informed that he had refused to become a surety; and whether those who affixed their names to the instrument afterwards did it under such circumstances as to render them liable; and also, whether the bond, if executed so that the obligors could make no objection to the execution, had been approved by the selectmen, according to law, and delivered so as to become effectual. The evidence on these questions was not in harmony one portion with another. But under the instructions given to the jury by the presiding judge, a verdict was rendered for the plaintiffs, which is sought to be vacated on a motion, because it was against the evidence adduced, and for other reasons stated in the motion. The conclusion of the court is, that the verdict cannot be disturbed on the motion, consistently with the principles well settled applicable to the facts of the case.

The question is then presented, whether the court erred in any of the rules of law which it stated to the jury, or whether it erroneously withheld any instructions which were requested by the defendants to be given to the jury, in matters of law.

The counsel in defense requested that twelve instructions, reduced to writing, should be given to the jury; five of which, the first, third, fourth, fifth, and seventh, were given as requested; the others were refused, given with qualifications, or were embraced in the general instructions.

The second requested instruction was, "that to constitute such a waiver of the condition [that all whose names were in the body of the bond should execute it according to the evidence, which was not in controversy], the party must be informed that Whittier was not to sign; and consent that it should be delivered as his bond without his name." This request assumes that the party could be legally holden only by express consent, given upon information, that the one whose name was erased was not to become a surety. The general instructions were substantially as follows: That if any or all of the sureties whose names were on the bond placed them there with the condition before stated, and that the bond should not be delivered without the fulfillment of that condition, it would not be binding on them, unless they waived that condition subsequently. But if they signed the bond without any condition, but for the purpose of indemnifying the town for any omission of official duty of the principal, and the bond was left to be delivered and used for the purpose for which it was signed, and it was so delivered, the delivery

would be valid and the signers would be bound, notwithstanding at the time of its execution they might have expected that all who were accepted by a vote of the town would become sureties on the bond. These instructions are more comprehensive than the one requested, which we are considering, and were not objectionable; and were all under the request to which defendants were entitled.

The last instruction requested had relation to the execution of the bond by those who affixed their names thereto, after the erasure of the name of Whittier in the body thereof, and was: "If any of the sureties signed the bond in pursuance of the agreement made at the town meeting, after the erasure of Whittier's name, but without knowing it, or knowing that he was not to sign, and at the time of signing annexed the condition that it should not be delivered without all signed whose names were accepted by the town, they would not be held." This instruction was not given.

When a party executes an instrument, which, from its terms, creates a liability, he is ordinarily supposed to know its contents and everything apparent upon it, and affected accordingly, if no fraud was practiced upon him, which in this case is not pretended. But whether a surety in fact signed the bond after the erasure, or a knowledge that Whittier was not to sign, or otherwise, is a question wholly immaterial under this request, as the general instructions to which we have referred embrace the case supposed, whether this knowledge existed or not; and the liability was made to depend upon the fact that the sureties who signed did not annex the condition that the bond was not to be delivered till it was signed by all whose names were on the list accepted by the town.

The sixth and seventh instructions requested were not given in the terms of the request, but were in substance a compliance therewith.

The eighth and ninth instructions requested that if the jury find that the officers of the town neglected to enforce a collection of the taxes, and the paying over the money on the part of Shaver, to October 23, 1858, or to take the tax bills from him, this would be such laches on the part of the town as would release the sureties from all liabilities for defalcation subsequent to the time when said officers were legally required to do so. And that that time was when the year was out, March, 1858. Such instructions have no statute or common-law principle for their support.

after they had been informed that he had refused to become a surety; and whether those who affixed their names to the instrument afterwards did it under such circumstances as to render them liable; and also, whether the bond, if executed so that the obligors could make no objection to the execution, had been approved by the selectmen, according to law, and delivered so as to become effectual. The evidence on these questions was not in harmony one portion with another. But under the instructions given to the jury by the presiding judge, a verdict was rendered for the plaintiffs, which is sought to be vacated on a motion, because it was against the evidence adduced, and for other reasons stated in the motion. The conclusion of the court is, that the verdict cannot be disturbed on the motion, consistently with the principles well settled applicable to the facts of the case.

The question is then presented, whether the court erred in any of the rules of law which it stated to the jury, or whether it erroneously withheld any instructions which were requested by the defendants to be given to the jury, in matters of law.

The counsel in defense requested that twelve instructions, reduced to writing, should be given to the jury; five of which, the first, third, fourth, fifth, and seventh, were given as requested; the others were refused, given with qualifications, or were embraced in the general instructions.

The second requested instruction was, "that to constitute such a waiver of the condition [that all whose names were in the body of the bond should execute it according to the evidence, which was not in controversy], the party must be informed that Whittier was not to sign; and consent that it should be delivered as his bond without his name." This request assumes that the party could be legally holden only by express consent, given upon information, that the one whose name was erased was not to become a surety. The general instructions were substantially as follows: That if any or all of the sureties whose names were on the bond placed them there with the condition before stated, and that the bond should not be delivered without the fulfillment of that condition, it would not be binding on them, unless they waived that condition subsequently. But if they signed the bond without any condition, but for the purpose of indemnifying the town for any omission of official duty of the principal, and the bond was left to be delivered and used for the purpose for which it was signed, and it was so delivered, the delivery

would be valid and the signers would be bound, notwithstanding at the time of its execution they might have expected that all who were accepted by a vote of the town would become sureties on the bond. These instructions are more comprehensive than the one requested, which we are considering, and were not objectionable; and were all under the request to which defendants were entitled.

The last instruction requested had relation to the execution of the bond by those who affixed their names thereto, after the erasure of the name of Whittier in the body thereof, and was: "If any of the sureties signed the bond in pursuance of the agreement made at the town meeting, after the erasure of Whittier's name, but without knowing it, or knowing that he was not to sign, and at the time of signing annexed the condition that it should not be delivered without all signed whose names were accepted by the town, they would not be held." This instruction was not given.

When a party executes an instrument, which, from its terms, creates a liability, he is ordinarily supposed to know its contents and everything apparent upon it, and affected accordingly, if no fraud was practiced upon him, which in this case is not pretended. But whether a surety in fact signed the bond after the erasure, or a knowledge that Whittier was not to sign, or otherwise, is a question wholly immaterial under this request, as the general instructions to which we have referred embrace the case supposed, whether this knowledge existed or not; and the liability was made to depend upon the fact that the sureties who signed did not annex the condition that the bond was not to be delivered till it was signed by all whose names were on the list accepted by the town.

The sixth and seventh instructions requested were not given in the terms of the request, but were in substance a compliance therewith.

The eighth and ninth instructions requested that if the jury find that the officers of the town neglected to enforce a collection of the taxes, and the paying over the money on the part of Shaver, to October 23, 1858, or to take the tax bills from him, this would be such laches on the part of the town as would release the sureties from all liabilities for defalcation subsequent to the time when said officers were legally required to do so. And that that time was when the year was out, March, 1858. Such instructions have no statute or common-law principle for their support.

The tenth and eleventh requests were, that the jury might be instructed that the plaintiffs can only recover damages for what they prove were actual deficits of the tax of 1857; and that the burden is on the plaintiffs to show what part, if any, of the sum of four hundred and ninety-five dollars and ninety-three cents, said to be due on the two years, was in fact a deficit of 1857, and they can recover only so far as they show that. These instructions were given, with the qualification that if Shaver was collector for the years 1856 and 1857, it was his duty to settle and pay over for both of those years, and he had a right to appropriate all payments made during the second year, at the time they were made, to the year to which he wished them applied. If he failed to make such appropriation, then the town would have the right to appropriate such payments as they might desire; and if no appropriation was made by either, the law would appropriate such payments to the oldest debts. If payments were made when there was only one liability, and that for the year 1856, in the absence of any appropriation by the parties, the law would apply them to that year; so that if the parties made no appropriation in this case, the whole of the deficit of the sum of four hundred and ninety-five dollars and ninety-three cents might be regarded as having occurred during the last year, and if so, would be recoverable in this suit, with interest from the time it ought to have been paid.

It was proved that about October 23, 1858, a partial settlement was made with Shaver, in behalf of the town, for the years 1856 and 1857; that there was a balance of the sum of four hundred and ninety-five dollars and ninety-three cents on both years, for money collected by him and not paid over; the amount of uncollected taxes taken from him, and he was credited for so much. Amount of uncollected commitment of 1856 was fourteen dollars and ninety-eight cents, and due on the bills. Uncollected taxes of 1857 were one hundred and two dollars and forty-three cents. It was not ascertained how much was the deficit in unpaid collections of the year 1856 or of 1857. There is a suit pending upon the bond of 1856, and the signers are not the same as those upon the bond of 1857.

It was for the defendants to show what part of this deficit belonged to one year and what to the other. The principal on the bonds is supposed to have the means of doing this, by the receipts taken by him, or by other modes. In the absence of all evidence on this question, we cannot assume that either

party made the appropriation to one year or the other. Hence the money which he paid from time to time must be treated as his own, and the law will make the appropriation thereof to discharge the liability which first accrued. That being done, and the amount of the collections which are withheld by the collector being fixed, the liability falls upon the obligors of the bond of 1857. The instructions were in accordance with this principle.

Exceptions are taken to the amendment of the verdict, allowed by the court, in changing the name of the principal defendant, so as to conform to the writ and all the papers in the case. This was the correction of the error of the clerk in preparing the blank verdict, which escaped the attention of the jury. The authorities cited for the plaintiffs to sustain the propriety of the amendment of the verdict, for a cause which existed and was apparent, upon inspection by the court, are full and conclusive.

Motion and exceptions overruled. Judgment on the verdict.

RICE, MAY, GOODENOW, DAVIS, and KENT, JJ., concurred.

WHERE COLLECTOR SERVES TWO SUCCESSIVE TERMS, and is sued on his second bond, no presumption arises as a matter of law, in the absence of proof that all payments made by him during his second year were made out of moneys collected from the revenue of that year: *St. Joseph v. Moriatt*, 72 Am. Dec. 207, note 208, where other cases are collected.

POWER OF COURT TO AMEND VERDICT: See *Wood v. McGuire's Children*, 63 Am. Dec. 246, note 248, where other cases are collected.

BOND NOT SIGNED BY ALL PARTIES NAMED THEREIN, VALIDITY OF: See *Fletcher v. Austin*, 34 Am. Dec. 698, note 700, where other cases are collected.

AUSTIN v. AUSTIN.

[80 MAINE, 74.]

BOND GIVEN BY ADMINISTRATOR BEFORE SALE OF HIS INTENTATE'S REAL ESTATE MUST BE APPROVED in writing by the judge of probate. But where the evidence fails to show affirmatively that the bond was so approved, and the contrary does not appear, if the record shows that all the other steps required by law were accurately taken; if the law required the bond to be approved by the judge before it could be legally filed, and the bond was in fact filed; if the sale was a public one, and the purchaser immediately entered under his deed, and has held undisturbed possession for more than twenty years—the law will authorize the conclusion that all was done that was required to give such purchaser a perfect title.

WHERE, ON APPLICATION OF WIDOW FOR DOWER, COMMISSIONERS ARE APPOINTED by the judge of probate, who publicly assign and set it out to her by metes and bounds, and she immediately enters upon the premises thus assigned to her, and continues in possession of the same, by herself and her lessee, for more than twenty years, without objection, the inference is legitimate that the dower was thus set out to her with the knowledge and consent, if not by the direct procurement, of the heirs at law, or those who were entitled to the freehold at the time, notwithstanding the fact that such commissioners made no return to the probate court. Under such circumstances and after such a lapse of time, it would be inequitable to disturb the assignment, which is not even now alleged to be unjust or unreasonable.

REAL action brought to recover certain lands. By agreement of the parties, the case was withdrawn from the jury, and the evidence reported to the full court, with jury powers, to draw inference therefrom. The other facts appear from the opinion.

J. Baker, for the demandants.

Voss and Voss, for the tenant.

By Court, *RICE, J.* The plaintiffs are the heirs at law of Benjamin Austin, who died about twenty-five years ago, intestate. The title to the estate in controversy was in him at the time of his decease. His estate was insolvent, and a portion of that now in dispute was sold by his administrator, by authority of the probate court, for the payment of debts, and a deed thereof from the administrator to the defendant was executed and delivered, February 6, 1836, under which the defendant immediately entered, and has held possession from that time to the present. It is conceded that all the preliminary measures required by the law to constitute a valid sale were taken by the administrator and the probate court, excepting that it does not appear by the record, or by papers now on file in the probate office, that the bond filed by the administrator was approved by the judge of probate.

By section 5, chapter 51, statute of 1821, the orders and decrees of judges of probate are required to be in writing; section 3 requires a record of the proceedings to be made; and section 9 provides that in all cases where by law bonds are required to be given to any judge of probate, or to be filed in the probate office, it shall be the duty of said judge first to examine and approve of such bond, and upon being so approved, but not otherwise, the said judge shall order the same to be filed or recorded in the probate office. Section 6 of chapter 470, laws

of 1830, requires a bond to be filed by an administrator before he can be authorized to sell the real estate of his intestate. Taking these statutes together, the reasonable construction may be that the bond in such case should be approved by the judge of probate in writing. The evidence produced fails to show affirmatively that the bond in this case was thus approved; nor does the contrary appear. But when we consider that this was a transaction that occurred more than twenty years ago; that the law required the bond to be approved by the judge before it could be legally filed; that the bond was in fact filed; that the record shows that all the substantial steps were taken required by law, and so far as the administrator was concerned, with technical accuracy; that the sale was a public one; and that the defendant immediately entered under his deed, and has held undisturbed possession for more than twenty years—the law would fully authorize the conclusion that all was done which was required to give the defendant a perfect title: 1 Greenl. Ev., sec. 20; *Simpson v. Norton*, 45 Me. 281.

This deed from the administrator covers the largest part of the land claimed by the demandants. There is, however, another portion of the same farm, which was also owned by Benjamin Austin at the time of his decease, known as the "widow's dower," and now in the possession of the defendant, which is also claimed by the demandants in this action.

The defendant claims the right to hold possession of this portion of the demanded premises by a lease from the widow of said Benjamin. The widow's right to dower in the estate in controversy is not denied, and it appears by the evidence in the case that she made application to the judge of probate for dower, October 26, 1836. On which application a warrant was issued to three commissioners to set out her dower, and that the commissioners proceeded and set out to her by metes and bounds that portion of her late husband's estate which the defendant holds by lease from her; and that she entered immediately and held personal possession thereof about twelve years, and from that time to date of plaintiffs' writ, it has been in the undisputed possession of the defendant under his lease from the widow. There has been no return of the commissioners to the probate court, nor have their proceedings in any way been made matter of record.

The evidence fails to show a legal assignment by order of court. This, however, is not absolutely essential to a valid

assignment. Dower may be assigned by parol. The widow being entitled of common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her without livery of seisin: Co. Lit. 35 a; 1 Bright on Husband and Wife, 366.

To bind the widow, it is necessary, not only that the assignment be accepted, but she must also enter upon it: 1 Roper on Husband and Wife, 400; 1 Bright on Husband and Wife, 375.

The assignment must be some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as will endure for her life, and the assignment must be absolute, unconditional, and without any exception or reservation in diminution of its value: Co. Lit. 34 b.

The person by right entitled to assign dower, when a court of law is not resorted to for the purpose, is the heir, or whoever may be owner of the freehold: Co. Lit. 34 b. The heir within age may assign dower: Id. 35 a. Or it may be assigned by guardian: *Young v. Tarbell*, 37 Me. 509; *Jones v. Brewer*, 1 Pick. 314. And the demand and assignment may be by parol, and need not be in writing: *Baker v. Baker*, 4 Me. 67; *Shattuck v. Gragg*, 23 Pick. 88; *Jones v. Brewer*, 1 Id. 313; *Luce v. Stubbs*, 35 Me. 92.

In view of the facts in this case, that the widow was undoubtedly entitled to dower in this estate; that it was publicly assigned to her, and set out by metes and bounds; that she immediately entered upon the portion thus assigned, and has continued openly to hold and occupy the same, by herself and her lessee, for a period of more than twenty years without objection, the inference is legitimate that it was thus set out to her with the knowledge and by the consent, if not by the direct procurement of the heirs at law, or those who were entitled to the freehold at the time; and that under such circumstances, after such a lapse of time, it would be inequitable to disturb this assignment, which is not, even now, alleged to have been unjust or unreasonable, and that there is no rule of law which would authorize or require it to be done. According to the agreement of the parties, a nonsuit is to be entered.

APPLETON, C. J., CUTTING, DAVIS, KENT, and WALTON, JJ., concurred.

ASSIGNMENT OF DOWER.—It is not necessary, to make an assignment of dower valid, that legal proceedings shall be resorted to by either party. The

person on whom is devolved the right or duty of making the assignment may proceed to set it apart, and if this is done fairly, it is as effectual and binding as if made under a judgment or decree of a court: 2 Scribner on Dower, 2d ed., 71; *Johnson v. Neil*, 4 Ala. 166; *Crocker v. Fox*, 1 Root, 227; *Boyers v. Newbanks*, 2 Ind. 388; *Leifers v. Henke*, 73 Ill. 405; *Robinson v. Miller*, 1 B. Mon. 88; *Stevens v. Stevens*, 3 Dana, 371; *Mitchell v. Miller*, 6 Id. 79; *Harrows v. Johnson*, 3 Met. (Ky.) 578; *Rutherford v. Graham*, 4 Hun, 796; *Gibbs v. Esty*, 22 Id. 266; *McMillan v. Turner*, 7 Jones L. 435; *Moore v. Waller*, 2 Rand. 418. The manner in which dower shall be assigned is, in several of the states, provided by statute: R. S. Ark. 1874, sec. 2228; *Stats. Conn.* 1854, p. 499, sec. 46; *Hurd's Ill. Stats.* 1880, p. 427, sec. 18; *McLain's Stats. Iowa*, 1880, sec. 2443; 2 *Comp. Laws Mich.* 1871, p. 1360, sec. 8; R. S. Ohio 1880, sec. 5707; *Pub. Stats. R. I.* 1882, p. 637, secs. 4 and 5; *Gen. Stats. Vt.* 1863, p. 413, sec. 12. Most of those statutes declare that the assignment shall not be binding upon the widow unless it is accepted by her. In New Hampshire, this rule is adopted by the courts: *Johnson v. Morse*, 2 N. H. 48; *Clark v. Manney*, 43 Id. 59.

DOWER MAY BE ASSIGNED BY PAROL. As the widow is entitled to her dower by common right, when her share is set off to her by assignment, and she has entered, the freehold vests in her without livery of seisin or writing. Park, in his work on dower, page 269, says: "Although no estate is vested in the dowress until the certainty of the land is ascertained by assignment, yet as the estate, although suspended in the mean time, does not pass by the assignment, but the dowress is in, in intendment of law, by her husband, neither livery nor writing is essential to the validity of an assignment." Co. Lit. 35 a; 1 *Bright on Husband and Wife*, 366; 2 *Scribner on Dower*, 2d ed., 73; 4 *Kent's Conn.* 63; *Rowe v. Power*, 2 Bos. & Pul. N. R., 1; *Johnson v. Neil*, 4 Ala. 166; *Hill v. Mitchell*, 5 Ark. 608; *Leifers v. Henke*, 73 Ill. 405; S. C., 24 Am. Rep. 263; *Boyers v. Newbanks*, 2 Ind. 388; *Baker v. Baker*, 4 Greenl. 67; *Curtis v. Hobart*, 41 Ma. 230; *Conant v. Little*, 1 Pick. 189; *Shattuck v. Gragg*, 23 Id. 88; *Johnson v. Morse*, 2 N. H. 48; *Pinkham v. Gear*, 3 Id. 163; *Meserve v. Meserve*, 19 Id. 240; *Gibbs v. Esty*, 22 Hun, 266. And this rule is applied whether the assignment is made in the manner prescribed by law, or by agreement of the parties: 2 *Scribner on Dower*, 2d ed., 73. But in some states, the assignment of dower is required by statute to be in writing: R. S. Ark. 1874, sec. 2440; *Stats. Conn.* 1854, p. 499, sec. 46; R. S. Ohio 1880, sec. 5707; *Pub. Stats. R. I.* 1882, p. 637, sec. 4.

BY WHOM ASSIGNMENT OF DOWER SHOULD BE MADE.—The heir, or whoever may be the owner of the freehold, is the proper person to assign the widow her dower: 2 *Scribner on Dower*, 2d ed., 75; 1 *Bright on Husband and Wife*, 364; *Shelton v. Carroll*, 16 Ala. 148; *Hill v. Mitchell*, 5 Ark. 608; *Mentfes v. Menfies*, 8 Id. 9; *Crocker v. Fox*, 1 Root, 227; *Robinson v. Miller*, 1 B. Mon. 88; *Jones v. Brewer*, 1 Pick. 314. The heir, although he be a minor, is competent to make an assignment of dower, for he may be compelled by suit to make the assignment, and if such a suit be brought, he will not be allowed to take advantage of his infancy so as to prevent an immediate assignment to the widow: 2 *Scribner on Dower*, 2d ed., 78; 1 *Bright on Husband and Wife*, 364; Co. Lit. 35 a; 1 *Roper on Husband and Wife*, 389; Park on Dower, 268; *McCormick v. Taylor*, 2 Ind. 336; *Young v. Tarbell*, 37 Ma. 509; *Boyers v. Newbanks*, Id. 388; *Jones v. Brewer*, 1 Pick. 314; *Moore v. Waller*, 2 Rand. 418. But in Illinois the guardian of an infant cannot assign dower so as to bind the minor on his arriving at the age of majority: *Bonner v. Peterson*, 44 Ill. 253. At common law, a guardian has power to assign

dower: 2 Scribner on Dower, 2d ed., 78; *Young v. Tarbell*, 37 Me. 509; *Curtis v. Hobart*, 41 Id. 230; *Jones v. Brewer*, 1 Pick. 314. A guardian in chivalry could assign dower: 2 Scribner on Dower, 75, 78; 1 Bright on Husband and Wife, 364; Co. Lit. 35 a; 1 Roper on Husband and Wife, 389. But a guardian in socage was not authorized to assign dower: 2 Scribner on Dower, 78; 1 Bright on Husband and Wife, 364; Co. Lit. 35 a; 1 Roper on Husband and Wife, 389. Tenants by *elegit*, by statute-staple, by statute-merchant, or for terms of years could not assign dower, because they were possessed of mere chattel interests: 1 Bright on Husband and Wife, 364; 1 Roper on Husband and Wife, 389; 2 Scribner on Dower, 75. But it is not necessary to the validity of the assignment that the estate in the person making it be a lawful freehold, for the assignment of dower is a legal obligation upon the tenant of the freehold, whether he obtains it by right or by wrong. And where he has obtained it by wrong, the widow is not obliged to wait for an assignment until the heir thinks proper to enter and defeat the tortious estate, for this he might never do. If, therefore, an abator, disseisor, or intruder makes such an assignment as the lawful tenant ought to have done, it will be good and binding upon such tenant: Co. Lit. 35 a; Park on Dower, 266; 1 Bright on Husband and Wife, 365; 2 Scribner on Dower, 76. But if the tortious freehold of the assignor has been obtained by means of collusion with the widow, the assignment will be voidable by the entry of the heir: 2 Scribner on Dower, 77; Co. Lit. 35 a; 1 Roper on Husband and Wife, 390.

Where two persons are joint tenants of an estate under a devise or conveyance from a man whose widow is entitled to dower out of it, and one of them assigns her a third part as her dower, the assignment will be good and binding upon his companion: 2 Scribner on Dower, 79; 1 Bright on Husband and Wife, 366; 1 Roper on Husband and Wife, 391. The widow of a tenant in common whose interest was conveyed in his life-time, without release of dower, to his co-tenant, may maintain an action for dower against the latter, to have her dower set out to her by metes and bounds: *Blossom v. Blossom*, 9 Allen, 254. A widow's dower in lands which were held in common by her husband, must be set out to her to hold as tenant in common during her life: *French v. Lord*, 69 Me. 537.

DOWNER IS SAID TO BE SET OUT ACCORDING TO COMMON RIGHT, when one-third part of the lands and tenements of which the widow is dowable is assigned to her by metes and bounds to be held by her for life. This is her right by the common law, and the assignment should be made in this way whenever it is practicable: 2 Scribner on Dower, 80; Co. Lit. 34 b; 1 Bright on Husband and Wife, 367; 1 Roper on Husband and Wife, 392. The sheriff's return to a writ of *seisin* ought to describe the portion allotted to the widow by metes and bounds whenever the subject-matter is capable of being so described; a particular end of a house or barn, or a one-third part of an orchard, is not a sufficiently definite description of the premises assigned: *Pierce v. Williams*, 3 N. J. L. 709. But a designation of tracts of land allotted as dower, by the description of them at the land-office, is sufficient, without describing them by metes and bounds: *Adams v. Barron*, 13 Ala. 205.

When an assignment in kind is impracticable, either from the nature of the husband's interest or from the nature and quality of the property itself, it will of necessity be dispensed with and some other mode adopted: 2 Scribner on Dower, 80; 1 Bright on Husband and Wife, 371; *Leifers v. Henke*, 73 Ill. 405; S. C., 24 Am. Rep. 263; *Scammon v. Campbell*, 75 Id. 223; *Walker v. Walker*, 2 Ill. App. 418; *Strickler v. Tracy*, 66 Mo. 465; *Wilson v. Branch*, 71 Va. 65. But the court is not authorized to substitute a compensation in money, merely because the assignment of dower in kind may prove to be

injurious to the interests of the heirs or creditors: *Wilson v. Branch*, *supra*. And in *Humes v. Scruggs*, 64 Ala. 40, it was held that the fact that the dwelling-house on the land constituted three fourths of the value of the entire property did not of itself show that dower could not be assigned by metes and bounds. If the husband be seised in common, or in coparcenary, dower will not be assigned to the widow by metes and bounds, but she shall have the third part of her husband's share, to hold in common with the heir and the other tenants: 2 Scribner on Dower, 80; Co. Lit. 32 b. If the husband die seised of a mill, the widow may be endowed either of the third toll dish, or of a third of the profits, or of the entire mill for every third month: 2 Scribner on Dower, 80; Co. Lit. 32 a. So where the husband dies seised of a ferry, the widow is to be endowed of one third of the rents and profits, or have the use of it one third of the time alternately: *Stevens v. Stevens*, 3 Dana, 371. Where there is no practical way in which dower can be assigned by metes and bounds, the widow is to be endowed by giving her one third of the rents and profits: *Leifers v. Henke*, 73 Ill. 405; S. C., 24 Am. Rep. 263; *Scammon v. Campbell*, 75 Ill. 223; *Hillgartner v. Gebhart*, 25 Ohio St. 557; 2 Scribner on Dower, 81; Park on Dower, 252; 1 Roper on Husband and Wife, 396. And where dower is assigned in a special manner, by giving one third of the rents and profits, it is proper to make deductions from the gross rents of the estate for repairs and taxes, but not for water-rents or insurance: *Hillgartner v. Gebhart*, *supra*. Where dower in city lots, which were improved by the owner after they were purchased from the husband, cannot be assigned to the widow by metes and bounds, it is proper to give her one third of the rental value of such lots, without the improvements, for her life: *Scammon v. Campbell*, 75 Ill. 223. Where the husband, in his life-time, aliens lands, his widow will not be dowable of the enhanced value of the property by the erection of buildings and other improvements: *Barney v. Frouney*, 9 Ala. 901. Where an agreed statement shows that dower in kind cannot be assigned to the widow, it is unnecessary to appoint commissioners for the admeasurement of dower, but the yearly value of the dower must still be ascertained: *Strickler v. Tracy*, 66 Mo. 465. Where the premises are found to be incapable of division, and the jury find the yearly value of the dower therein, their verdict is binding upon all the parties, unless set aside by the court. It is not like the verdict of a jury on the trial of a feigned issue out of chancery: *Walker v. Walker*, 2 Ill. App. 418. But where the yearly value of dower has to be assessed because the premises are incapable of division, it is error to require full payment of the dower before the expiration of the year: *Carter v. Stookey*, 60 Ill. 279. It seems that at common law the heir is not compellable to assign the mansion-house of his father to his mother for her dower. And in Virginia, it has been decided that the widow is not entitled, as of right, to have the mansion-house assigned to her, although it was said to be the general practice to set it apart for her: *Devaughn v. Devaughn*, 19 Gratt. 556. But in several states it is provided by statute that the homestead or dwelling-house, and the outhouses and other improvements, shall be set out to the widow, if she desires it, and it can be done without injustice to the children of the deceased: R. S. Ark., sec. 2228, 2229; Code Ala. 1876, sec. 2246; McClellan's Fla. Dig. 1881, p. 475, sec. 1; Hurd's Ill. R. S. 1880, p. 428, sec. 37; McLain's R. S. Iowa 1880, sec. 2441; Battle's Revisal, N. C., 1873, p. 839, sec. 2; Tenn. Code 1858, sec. 2401; *Langdon v. Stephens*, 6 Ala. 730; *Hill v. Mitchell*, 5 Ark. 608. But the widow is not entitled to receive the entire mansion-house in addition to her one-third part of the lands: *Langdon v. Stephens*, *supra*.

WHERE HUSBAND DIES SEISED OF SEVERAL DISTINCT PARCELS OF LAND, the widow may accept an assignment of her dower in any one or more of

them in lieu of her dower in all of them, and if the assignment is confirmed by entry, it will be binding upon her: *Milton v. Milton*, 14 Fla. 369; *Schnelly v. Schnelly*, 26 Ill. 116; *Montgomery v. Horn*, 46 Iowa, 285; *Jones v. Jones*, 47 Id. 337; *Alderson v. Henderson*, 5 W. Va. 182. And when dower has been assigned to the widow in one tract, and after several years she discovers that her husband had other lands in the same county, she cannot have additional dower assigned in the first tract in which she has already had all the dower to which she was entitled, no appeal having been prosecuted from the judgment assigning the dower: *Milton v. Milton*, 14 Fla. 369. Under the Delaware statute, the orphans' court may assign dower out of the whole of the decedent's lands, or out of each parcel separately: *Elison v. Elison*, 3 Del. Ch. 260. If, however, there be more than one tenant, no more than one third can be taken from each tenant: *In re Garrison*, 15 N. J. Eq. 393. If the widow accepts dower and enters into possession of the portion assigned to her, in the absence of fraud or imposition, she will be bound by the assignment: 1 Bright on Husband and Wife, 367. And this, though the assignment may have been irregularly made, or made by a court which had no jurisdiction: *Johnson v. Neil*, 4 Ala. 166; *Adams v. Barron*, 13 Id. 205; *Robinson v. Miller*, 1 B. Mon. 88; S. C., 2 Id. 284; *Mitchell v. Miller*, 6 Dana, 79; *Pinkham v. Gear*, 3 N. H. 163; *Griffin v. Fowler*, 3 Sandf. 385; 2 Scribner on Dower, 66. But a decree for a specific sum in lieu of dower cannot be made without the assent of all the parties interested: *Herbert v. Wren*, 7 Cranch, 370; *Beavers v. Smith*, 11 Ala. 20; *Johnson v. Elliott*, 12 Id. 112; *Fry v. Merchants' Ins. Co.*, 15 Id. 810; *Wilson v. Dawson*, 2 Rob. (Va.) 384; *Blair v. Thompson*, 11 Gratt. 441; *Harrison v. Payne*, 32 Id. 387. The allowance of a gross sum in lieu of dower is purely statutory, and the practice in the several states is not uniform: 2 Scribner on Dower, 171, 652.

WIDOW IS ENTITLED TO CROPS growing on the land which has been assigned to her as dower: 2 Scribner on Dower, 89; 1 Bright on Husband and Wife, 386; *Street v. Saunders*, 27 Ark. 554; *Talbot v. Hill*, 68 Ill. 106; *Ralston v. Ralston*, 3 G. Greene, 533; *Parker v. Parker*, 17 Pick. 236; *Clark v. Betts*, 1 Thomp. & C. 58. But her right to such crops does not attach until her dower has been assigned: 2 Scribner on Dower, 799; *Budd v. Hiler*, 27 N. J. L. 43.

RIGHTS OF WIDOW BEFORE ASSIGNMENT OF HER DOWER are very imperfect. She is not entitled to enter on her third until it is duly assigned to her. She has no estate in the lands, and cannot maintain ejectment therefor until the assignment is made: 1 Bright on Husband and Wife, 362; *Hill v. Mitchell*, 5 Ark. 608; *Sharpley v. Jones*, 5 Harr. (Del.) 373; *Hendrix v. McBeth*, 61 Ind. 473; S. C., 28 Am. Rep. 690; *Shields v. Hunt*, 39 N. J. Eq. 485; *Altman v. Harshell*, 98 N. Y. 186.

REMEDY FOR DOWER IS AT LAW, but courts of equity also have concurrent jurisdiction in such cases: 2 Scribner on Dower, 91, 152; *Herbert v. Wren*, 7 Cranch, 370; *Powell v. Monson Mfg. Co.*, 3 Mason, 347, 459; *Menifee v. Menifee*, 8 Ark. 9; *Swaine v. Perine*, 5 Johns. Ch. 482; S. C., 9 Am. Dec. 318. In Kentucky, a bill in equity has superseded the common-law writ *Waters v. Gooch*, 6 J. J. Marsh. 586; S. C., 22 Am. Dec. 108. The statutes of most of the states have provided a summary mode for obtaining an assignment of dower, by application to the probate courts, and this method of proceeding has, to a great degree, superseded the common-law remedy: 2 Scribner on Dower, 175.

PRESUMPTIONS IN FAVOR OF PROBATE PROCEEDINGS: See *Doolittle v. Helms*, 67 Am. Dec. 745, note 748, where other cases are collected.

SHAW v. SHAW.

[50 MAINE, 94.]

PAROL EVIDENCE IS INADMISSIBLE TO PROVE THAT PROMISSORY NOTE WAS INTENDED AS RECEIPT for money placed in the defendant's hands by the payee to be loaned for him.

PAROL EVIDENCE OF ORAL AGREEMENT MADE AT TIME OF MAKING or indorsing a promissory note cannot be permitted to vary or contradict the terms of the written contract.

ASSUMPSIT on a promissory note of the defendant. The defendant offered evidence to prove that the note was given as a receipt for money which the plaintiff gave the defendant to be loaned by him in such manner as the defendant might consider most advantageous to the plaintiff; that he loaned it, taking great care to loan it safely and well, but the parties to whom it was loaned failed, and no part of it has been repaid; that the plaintiff knew and approved of the parties to whom the loan was made; and that the defendant was the agent of the plaintiff in making the loan. The judge held the evidence to be inadmissible.

Danforth, for the plaintiff.

Whitmore, for the defendant.

By Court, APPLETON, C. J. The evidence offered was at variance with the terms of the note in suit. In *Billings v. Billings*, 10 Cush. 178, parol evidence was held inadmissible to show that a promissory note, in the usual form, was intended as a receipt, and that the sum for which the note was given was in fact a payment by the payee to the maker of an antecedent debt, and not a loan or advancement. So in an action on a note payable absolutely, evidence is not admissible to prove an oral agreement, when the note was made, that it should be given up in an event which has happened: *Tower v. Richardson*, 6 Allen, 351; *Currier v. Hale*, 8 Id. 47. Indeed, the law seems well settled that parol evidence of an oral agreement, made at the time of the making or indorsing a note, cannot be permitted to vary or contradict, to add to, or subtract from, the terms of the written contract: *Underwood v. Jimonds*, 12 Met. 275; *Woodbridge v. Spooner*, 3 Barn. & Ald. 233; *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. 39; *Hoyt v. French*, 24 N. H. 198.

Default to stand.

CUTTING, DAVIS, WALTON, and BARBOWS, JJ., concurred.

PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY TERMS of a written contract: *Fulton v. Hood*, 75 Am. Dec. 664, note 672, where other cases are collected; *Stevens v. Haskell*, 70 Me. 206, citing the principal case.

CLIFFORD v. THOMASTON MUTUAL INSURANCE CO.

[80 MAINE, 197.]

NO PRESUMPTION EXISTS THAT LOSS OF MISSING SHIP HAPPENED IMMEDIATELY AFTER LAST NEWS; the question when a presumption of loss arises is a question of fact for the jury, to be determined in view of all the facts and circumstances in the case, and when a presumption of loss has arisen, the question as to the precise time when it occurred is to be determined in the same way.

ASSUMPSIT on a policy of insurance on one fourth of the brig *Hesperus*. The question to be determined was, under which of the policies mentioned in the opinion the loss occurred. The plaintiffs contended that there is a rule of law which requires that policy to be paid under which the vessel sailed, or was last heard of, in the absence of proof of the time of loss. If the court should be of opinion that, upon the facts reported, the defendants are liable in this action, they were to be defaulted; but if the defendants' liability was a question of fact for the jury, the action was to stand for trial.

M. H. Smith, for the plaintiffs.

Gould, for the defendants.

By Court, MAY, J. Insurance for two thousand dollars was effected by the plaintiffs in the defendant company, by a policy upon one fourth of the brig *Hesperus* for one year from the thirteenth day of January, 1855, at noon, upon which policy this action is brought. The brig sailed from Boston for the Lobos islands, not more than nine days before the expiration of said policy, the voyage ordinarily requiring from thirty to forty days, and has not been heard from since her departure. Subsequently Woodbridge Clifford, one of the plaintiffs, effected another insurance in the same company, upon one eighth of said brig, the risk commencing at the termination of the first policy.

It is conceded by the defendants that the brig had been missing for a period of time sufficiently long to raise the presumption of her loss prior to the commencement of this suit; and the only question now raised is, whether the common law, which prevails in this state, has any fixed rule by which the

loss, in case of missing vessels, is to be presumed as having occurred immediately after the date of the last news, so that the loss must fall under the policy then in force, without regard to any evidence offered touching the state of the weather after sailing, the dangers of the voyage in its various parts, the season of the year, and other circumstances tending to show when the loss probably occurred. It is contended for the plaintiff that such is the law.

The authorities cited by the counsel for the plaintiffs, in his very able argument upon the question presented, clearly show that the rule he contends for is the law of France; and the reasons which he presents, as tending to show the propriety and necessity of the rule, are not without great force. It appears, however, that this rule, as stated by Emerigon and other distinguished foreign writers, had its origin, not in the common law, but in an ancient ordinance of the French government. So, too, the same government, as well as Spain, and perhaps some other European states, has its fixed rule as to what length of time a vessel must be at sea without being heard from, in order to raise a presumption of loss. The time, however, differs in different countries and in different voyages. The commercial policy of each of the governments referred to has, however, made the rule, as to time when a presumption of loss shall arise, absolute in each particular case.

No case has been cited in this country or from England in which it has been held that the common law has any fixed time within which the loss of a missing vessel, unheard from, is to be presumed; and when presumed from the facts and circumstances of the case, no case is found fixing the precise time of the loss, or that it occurred immediately after the latest news. On the contrary, all the cases, so far as any have been cited or examined, show that the question when a presumption of loss arises is a question of fact for the jury, to be determined in view of all the facts and circumstances in the case; and when a presumption of loss has arisen, the question as to the precise time when it occurred is to be determined in the same way.

In the case of *Brown v. Nielson*, 1 Cai. 525, cited in defense, it appears that the missing vessel sailed from Norfolk, Virginia, for New York, March 4, 1801, the policy expiring the twenty-eighth of the same month; and the question whether the loss happened within the life of the policy was submitted

to the jury, under instructions from the presiding judge that they must determine the time of the loss from the evidence in the case, and this instruction was held to be correct.

In Arnould on Insurance (vol. 2, Perkins's 2d ed., p. 797), the author, after stating the rule in France to be that, in the case of a missing ship, the loss will be presumed to have happened immediately after the last news, says that "in our law, no fixed periods are established after which a ship not heard of shall be deemed to have perished at sea, but each case is left to depend on its own circumstances and the judgment of practical men." As no authority is cited to the contrary from any court of common law, it may well be presumed that Chancellor Kent, in the extract cited from his Commentaries (vol. 3, p. 301), had reference to the French rule before referred to; but if it is not so, he is unsustained by any respectable authority. From the authorities which have been cited, and many others that might be, we have no hesitancy in coming to the conclusion that no such rule exists at common law as that for which the counsel for the plaintiffs contends.

It may not, however, be needless to remark, that the conclusion to which we have arrived is greatly strengthened by the decided cases in regard to the precise time of the death of a person who has been absent from the place of his residence for seven years or more without being heard from. The cases are uniform that, although the presumption of his death arises at the end of seven years, yet there is no presumption of law as to what precise time it occurred, and the time of his death is to be determined by a jury, upon the circumstances of the case: See 1 Greenl. Ev., sec. 41, note 3, and cases there cited. In one of which, that of *Doe v. Nepean*, 5 Barn. & Adol. 86, it appears that the person, the time of whose death came in question, was last known to have sailed in a vessel which was never heard from, and yet the court held that the precise time of his death was for the jury, upon the facts in the case. In this case, in the absence of all other facts, there could have been no reasonable doubt that the death of the person in question, and the loss of the vessel in which he sailed, were simultaneous, and yet no such rule as is now urged was contended for: See also *Eagle v. Emmet*, 4 Bradf. 117; *Spencer v. Roper*, 13 Ired. 333. This class of cases are so analogous to the question before us, that no reason is perceived why the same rule should not apply to both classes of cases.

The question as to the admissibility of proof to show as

existing usage among insurance offices, in the case of missing vessels, to presume that the loss took place immediately after the last news, though somewhat discussed by the counsel for the plaintiffs, is not before us, and therefore is not considered. The result is, that according to the agreement of the parties, the case is to stand for trial.

Action to stand for trial.

TENNEY, C. J., and RICE, CUTTING, GOODENOW, and DAVIS, JJ., concurred.

PRESUMPTION OF SURVIVORSHIP, WHICH PREVAILS AT CIVIL LAW, where death ensues in a common disaster, has no sanction in our system of jurisprudence: See *Coye v. Leach*, 41 Am. Dec. 518, note 522, where this subject is discussed at length.

NORTH BANK v. BROWN.

[50 MAINE, 214.]

PENDING OF ACTION IN ONE STATE BETWEEN SAME PARTIES FOR SAME CAUSE, at the time when an action is commenced in a court of another state, cannot invalidate the judgment of the latter court, where it had jurisdiction of the parties and of the subject-matter, and the fact that another action was pending was in no manner made known to it. And such judgment will bar a recovery in such prior pending suit.

ACTION against indorser of promissory notes. The opinion states the case.

Ruggles, for the plaintiffs.

Gould and William Fessenden, for the defendant.

By Court, TENNEY, C. J. This is an action against the defendant, as indorser of two negotiable promissory notes of hand. The defense is, that after this suit was commenced, the plaintiffs caused another suit to be instituted in the state of New York, against the defendant for the same cause; that personal service was made upon him, and he appeared in court, answered to the action, and defended till judgment was rendered against him for the amount of the two notes declared, and for costs.

The doctrine is well established, that a judgment between parties, both of whom are and have been resident in this state, of a court having jurisdiction of the subject-matter, of another of the United States, when personal service of the original writ was made on the defendant, who appeared in

court, answered to the action and made defense, is valid and entitled to the same faith and credit that judgments rendered within our own jurisdiction are entitled to: *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Hall v. Williams*, 10 Me. 278; *Hall v. Williams*, 6 Pick. 232 [17 Am. Dec. 356]; *Middlesex Bank v. Butman*, 29 Me. 19; *Cleaves v. Lord*, 43 Id. 290.

The plaintiffs instituted this suit on January 11, 1858. And on January 21, 1858, they commenced a suit for the same cause, against the defendant, in New York, caused personal service to be made upon him, who appeared in court, answered to the action by counsel, and defended the same till judgment was rendered on August 14, 1858. No defense was made, on the ground of the pendency of the action in this state.

The question presented for our consideration is, whether the judgment, so obtained in the state of New York, was a nullity, or can be avoided, by proof that this action was pending when the other was commenced and when judgment was rendered thereon.

It is hardly necessary to remark that the facts, upon which it is insisted, for the plaintiffs, that the judgment is one which is void or can be avoided, not being in any manner made known to the court in New York by them, during the pendency thereof, can have no effect by possibility to invalidate that judgment. It would certainly be a very novel mode of reversing a judgment rendered by a court, having jurisdiction of the parties as well as the subject-matter, and which the plaintiffs sought to obtain, and did obtain. If the pendency of the present action was known to the defendant at the time he had the right to file a plea in abatement for that cause, he could have done so, but if he chose to waive that defense, the plaintiffs could not then or at this term complain, and invoke this waiver, to the prejudice of him. If they had not desired to prosecute that action to judgment, after it was commenced, they could at any moment have discontinued it.

That judgment must be treated as having every element and all the effects of a judgment rendered within this state for the same cause between the same parties. The contract upon which that judgment was recovered is merged therein and extinguished thereby. It constitutes a new debt, having its first existence at the time it was rendered: *Holbrook v. Foss*, 27 Me. 441; *Pike v. McDonald*, 32 Id. 418 [54 Am. Dec. 597]. An action may be maintained thereon in this state, and if it should be treated as no bar to the present suit, the plaintiffs

would have two judgments against the same defendant for the same cause of action.

Plaintiffs nonsuit.

Judgment for defendant.

RICE, CUTTING, MAY, GOODENOW, and DAVIS, JJ., concurred.

RECOVERY OF JUDGMENT IN ONE STATE IS BAR to the further prosecution of the same cause of action by the same parties in another state: *Bank of North America v. Wheeler*, 73 Am. Dec. 683, note 688.

STORER v. EATON.

[50 MAINE, 219.]

AGENT WHO NEGLECTS TO INSURE CARGO SHIPPED TO HIM, as directed by the owner, cannot maintain an action for a premium of insurance, although he would have been liable to the owner in damages for neglect of duty, in case the cargo had been lost.

ASSUMPSIT to recover the premium on an alleged insurance of a cargo of lumber. When the vessel was ready for sea, the defendant telegraphed to the plaintiffs to insure the cargo. The plaintiffs admitted that they did not procure any insurance upon the cargo, and that it arrived safely. But they contended that they were liable to the defendant for neglecting to insure, and thereby became themselves the insurers, and entitled to the premium.

Kennedy, for the plaintiffs.

Gould, for the defendant.

By Court, RICE, J. The plaintiffs admit that it was their duty to have procured insurance upon the cargo of the defendant, consigned to them, according to his instructions, and that they neglected so to do.

For such negligence, in case of loss, they would have been responsible to the defendant for all the losses sustained by want of insurance: Story on Agency, sec. 190.

But from such negligence no action could arise to them to recover the premium, for the reason that no contract of insurance existed between them and the defendant, either express or implied: 1 Duer on Insurance, 61, c. 11.

On the contrary, in case of loss, they would have been liable to the defendant in damages for neglect of duty, to the full amount of the insurance which they should have effected for

his benefit, less the premium: *De Taslet v. Crousellat*, 2 Wash. C. C. 132.

Plaintiffs nonsuit.

TENNEY, C. J., and CUTTING, MAY, GOODENOW, and DAVIS, JJ., concurred.

AGENT WHOSE DUTY IT IS TO INSURE PROPERTY OF HIS PRINCIPAL, and who neglects to do so, is liable to the latter for any loss of the property occasioned by a peril that he should have insured against: *Strong v. High*, 38 Am. Dec. 195.

NEWBERT v. CUNNINGHAM.

[50 MAINE, 231.]

ATTORNEY'S LIEN DOES NOT ATTACH IN SUIT UNTIL RENDITION OF JUDGMENT THEREIN, but when judgment has been obtained, an execution issued, and the lien has attached thereto, it extends to suits arising from and incidental to the enforcement of the judgment.

WHERE JUDGMENT IN REPLEVIN SUIT IS RENDERED FOR DEFENDANT, the attorney has a lien on the execution issued thereon, and to the extent of the lien, is to be regarded as an equitable assignee, and as such, entitled to the protection of the law in the enforcement of his claims. To that extent, his rights of action are co-extensive with those of his client.

ATTORNEY IS NOT BOUND TO GIVE NOTICE OF HIS INTENTION TO RELY ON HIS LIEN, in order to make it available against the discharge of the creditor.

ATTORNEY, AS EQUITABLE ASSIGNEE, HAS RIGHT TO ENFORCE REPLEVIN BOND, to the extent of his lien, and this right the obligee in the bond cannot defeat.

OFFICER IS LIABLE FOR TAKING REPLEVIN BOND WITH INSUFFICIENT SURETIES, where the execution issued against them cannot be satisfied by reason of their insolvency. The attorney has the right to enforce such liability by an action in the name of the defendant in the replevin suit, to whom the bond was made, and his discharge of the officer cannot defeat the attorney's right to recover.

RIGHT OF ACTION AGAINST SHERIFF FOR TAKING INSUFFICIENT SURETIES IN REPLEVIN does not accrue until after the lien of the attorney has become perfected by the rendition of judgment in the replevin suit, and the statute of limitations in such case does not begin to run till then.

ATTORNEY'S LIEN EXTENDS ONLY TO SUCH FEES AND DISBURSEMENTS AS ARE TAXED AND INCLUDED IN THE EXECUTION.

ACTION on the case. The facts are stated in the opinion.

Gould and Robinson, for the plaintiff in interest.

Bulfinch, for the defendant.

By Court, APPLETON, C. J. It appears from the evidence in the case, that Philip Newbert commenced an action of re-

plevin against Joseph W. Newbert, in which the defendant recovered judgment and for a return. The execution issuing thereon being returned unsatisfied, the present plaintiff commenced a suit on the replevin bond against Philip Newbert et al., in which judgment was rendered in his favor. Philip Newbert and the surety on his bond being insolvent, this suit was commenced against the late sheriff of this county, for the default of one Cole, his deputy, in not taking a sufficient replevin bond. Since its commencement, Cole has settled with the plaintiff of record, and procured from him a discharge.

The replevin suit was defended, and that on the replevin bond prosecuted, till final judgment was rendered in each case, by A. P. Gould, esq., an attorney of this court, who, having a lien on the judgments obtained in the above actions, claims by force thereof, and as assignee, to control this action and defeat the discharge the defendant has obtained.

The attorney has a lien on all papers of his client which come into his hands, which may be enforced by the retention thereof until such lien is satisfied.

An attorney's lien does not attach in a suit until the rendition of judgment therein. But this principle applies only in the first instance. When judgment has been obtained, an execution issued, and the lien has attached thereto, it extends to suits arising from and incidental to the enforcement of the judgment. Were it not so, the lien would obviously be of slight value.

Judgment, then, having been rendered in favor of the defendant in the replevin suit, the attorney, having in his hands the execution which issued, had a lien thereon. To the extent of such lien, he is to be regarded as an equitable assignee, and as such, entitled to the protection of the law in the enforcement of his claims. To that extent his rights of action are co-extensive with those of his client. In *Martin v. Hawks*, 15 Johns. 405, the attorney had a lien on a judgment recovered for his costs. The execution was placed in the sheriff's hands for collection, who voluntarily suffered the debtor to escape. The attorney brought an action for the escape against the sheriff, in the name of his client. It was held that the sheriff could not avail himself of a release from the original plaintiff in bar of the action, such release being a fraud upon the attorney, as it was executed with notice to all parties of his lien for costs. In *Wilkins v. Batterman*, 4 Barb. 48, a party was committed to jail upon a *ca. sa.*, which showed upon its face that

turn, has failed to return upon demand the property replevied: *Harriman v. Wilkins*, 20 Me. 93. The right of action for not taking a sufficient bond, therefore, did not accrue till after the lien of the attorney had become perfected by the rendition of judgment in the replevin action. The suit, therefore, is one of the recognized modes of rendering the judgment recovered available to the party in whose favor it was rendered, or to his assignee. The client is not to be allowed to deprive the attorney of his lien, any more than the assignor would be permitted to defeat his assignment.

This lien, by the revised statutes of 1857, c. 84, sec. 27, is for "so much of the . . . execution as is due to the attorney for fees and disbursements therein." The fees must be taxed and included in the execution, and the disbursements must likewise be for taxable items included therein: *Ocean Ins. Co. v. Rider*, 22 Pick. 410; *Woods v. Verry*, 4 Gray, 357. But this lien does not extend to professional services other than those taxed and included in the execution.

Defendant defaulted.

RICE, CUTTING, DAVIS, KENT, and WALTON, JJ., concurred.

LIEN OF ATTORNEY ON JUDGMENT: See *Dodd v. Brott*, 66 Am. Dec. 541, note 543, where other cases are collected. The lien of an attorney does not attach until the rendition of judgment, and before that the parties may settle and disregard the claims of the attorney: *Averill v. Longfellow*, 66 Me. 238, citing the principal case. An attorney's lien extends to fees in suits arising from and incidental to the enforcement of the judgment which he has obtained: *Renick v. Ludington*, 16 W. Va. 392, also citing the principal case.

ESTY v. BAKER.

[50 MAINE, 225.]

WHERE DEED CONTAINS TWO INCONSISTENT DESCRIPTIONS OF LAND CONVEYED, the grantee is entitled to hold that which is most beneficial to him.

WHERE SOME PARTICULARS OF DESCRIPTION OF ESTATE CONVEYED DO NOT AGREE, those which are uncertain, and liable to errors and mistakes, must be governed by those which are more certain.

DEED CONVEYING GRIST-MILL "WITH THE LAND AND PRIVILEGES, where the same is situated, necessary for and attached to said grist-mill; hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with the said grist-mill and privilege," conveys all the land and privilege not before sold by the grantors, and connected with the mill and privilege, and not merely what is strictly necessary for and attached to the mill; but if the parties have,

by their subsequent acts and occupation, adopted a different construction of the deed, treating the grant as embracing not all the lands and privilege on the dam not previously sold, but all the lands and privilege connected with the grist-mill not previously sold, the court will not interfere with their construction.

ALIENATION OF ESTATE BY LANDLORD CHANGES TENANCY AT WILL TO TENANCY AT SUFFERANCE.

STATUTE PROVIDING FOR TERMINATION OF TENANCY AT WILL BY NOTICE in writing served upon the occupant thirty days before the time fixed in said notice for the termination thereof, does not provide that such tenancies cannot be terminated in any other way; tenancies at will at common law may be terminated in the same manner as before the statute.

TENANT AT SUFFERANCE CANNOT MAINTAIN TRESPASS *quare clausum fregit* for a peaceable entry.

TRESPASS *quare clausum fregit*. The opinion states the facts.

J. Granger, for the plaintiff.

Bradbury, Blake, Garnsey, and Madigan, for the defendant.

By Court, DAVIS, J. This case has been presented to the court before (48 Me. 495), upon a report of the evidence differing in many respects from that now reported. It was then ordered to be tried by a jury, and upon that trial new questions of law were raised. The verdict being for the defendant, the plaintiff now presents the case again upon exceptions, and a motion for a new trial.

The plaintiff owned a mill and privilege on the Meduxnekeag stream, in Houlton; and he occupied a passage-way and platform adjacent thereto. He derived his title to the premises through mesne conveyances from J. S. and A. R. Putnam, by their deed to Rufus Mansur, dated April 29, 1844.

In the summer of 1857, the defendant entered upon a portion of the passage-way, and erected a shop thereon in part; and he placed a shaft across the passage-way to connect the machinery in the shop with the water-wheel of a grist-mill. For that entry this action of trespass *quare clausum* was brought by the plaintiff.

The defendant entered under a lease from the owners of the grist-mill, who also derived their title through mesne conveyances from the Putnams, by their deed to Batchelor Hussey, dated May 18, 1843. The description of the premises conveyed by this deed is as follows: "The grist-mill in said Houlton on the Meduxnekeag stream, now owned and occupied by us, together with the land and privileges where the same is situated necessary for and attached to said grist-mill; hereby meaning and intending to convey all the lands and mill privi-

lege (not heretofore sold by us) on the dam connected with said grist-mill and privilege."

This was a mortgage deed; and the debt secured by it not being paid, it was afterwards foreclosed. The validity of the foreclosure is not questioned.

The defendant contends that the deed to Hussey embraced "all the lands and privilege" owned at the time by the Putnams "on the dam connected with the grist-mill."

The plaintiff contends that nothing passed by the deed except what was "necessary for and attached to said grist-mill."

An explanatory clause added to the clause containing the grant sometimes has the effect to diminish, and sometimes to enlarge, the grant; and sometimes it is rejected as repugnant to the grant: *Forbush v. Lombard*, 13 Met. 109; *Chesley v. Holmes*, 40 Me. 536; *Pike v. Monroe*, 36 Id. 309 [58 Am. Dec. 751]. The authorities on this subject are collected in the case of *Melvin v. Proprietors of Locks etc.*, 5 Met. 15 [38 Am. Dec. 384], and the following general rules are deduced:

"If there be two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold that which will be most beneficial to him."

"If some of the particulars of the description of the estate conveyed do not agree, those which are uncertain and liable to errors and mistakes must be governed by those which are more certain."

If the deed of the Putnams to Hussey, by the explanatory clause, commencing with the words "hereby meaning and intending to convey," embraces all the lands and privilege on the dam not previously sold by them, such a construction is not only more beneficial to the grantee, but more definite and certain than a grant of what was necessary for and attached to the mill. The former is susceptible of actual demonstration and proof by fixed boundaries; the latter can be determined only by the varying opinions and imperfect judgment of men.

But does the explanatory clause in that deed embrace all the lands not previously sold by the grantors? This raises a question of verbal construction of no little difficulty; for the clause may be analyzed, and the words supplied which are not expressed, in two ways, without doing any violence to the language.

Thus: "Hereby meaning and intending to convey all lands and mill privilege (not heretofore sold by us) on the dam [which is] connected with said grist-mill and privilege."

Or: "Hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam [which are] connected with said grist-mill and privilege."

So far as appears in the evidence reported, the parties themselves, by their subsequent acts and occupation, seem to have adopted the latter construction, treating the grant as embracing, not all the lands and privilege on the dam not previously sold, but all the lands and privilege connected with the grist-mill. This construction is most favorable to the plaintiff, and is in harmony with the instructions given to the jury. He therefore has no reason to complain; and it is unnecessary for us to express any opinion in regard to its correctness.

The plaintiff contended, at the trial, that if the passage-way was not embraced in the deed from the Putnams, he had occupied it for a long time with their consent; that he was therefore a tenant at will; and that until the tenancy should be terminated by a notice to quit, according to the statute, the defendant, or his lessors, had no right of entry. But the jury were instructed "that if the plaintiff was the tenant at will of the Putnams, that tenancy was terminated by the sale to Hussey; that the alienation of the estate changed the tenancy at will to a tenancy at sufferance."

The plaintiff appears to have occupied with the consent of the subsequent owners, as much as of the Putnams, until the defendant took his lease for a term of years, in 1857. But the principle would apply to the last alienation as well as to the first. It is not claimed that the defendant ever gave such consent.

The statute in force at the time provided that "tenancies at will might be terminated by notice in writing served upon the occupant thirty days before the time fixed in said notice for the termination thereof:" Law of 1853, c. 39, sec. 1.

This statute, and the one which preceded it, requiring a longer notice, enabled a landlord to terminate such a tenancy without entry therefor, or alienation. It does not provide that such tenancies cannot be terminated in any other way. And even if this is implied in tenancies at will under the statute, such tenancies at common law may be terminated in the same manner as before.

"If the landlord enters on the land and cuts down the trees demised, or makes a feoffment, or a lease for years to commence immediately, the estate at will is thereby determined:" 1 Crui. Dig., tit. 9, c. 1, sec. 18. "It is an intrinsic quality of

an estate at will," says Shaw, C.J., "that it is personal, and cannot pass to an assignee; and that, by an alienation in fee or for years, the estate at will is *ipso facto* determined, and cannot subsist longer. This is a limitation of the estate which is incident to its very nature. When, therefore, it is determined by operation of law, it is determined by its own limitation, without notice:" *Howard v. Merriam*, 5 Cush. 563. And in *Curtis v. Galvin*, 1 Allen, 215, the same doctrine is stated by Bigelow, C. J. "The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit, given according to the requisitions of the statute:" *McFarland v. Chase*, 7 Gray, 462.

This might seem at first view to be in conflict with the case of *Young v. Young*, 36 Me. 133. But that decision, if correct, does not apply to the case at bar. The tenant in that case was in possession under a parol lease, at an agreed rent. Except by special provision of statute, it would have been a valid lease from year to year. It was a tenancy at will by statute. And it is expressly declared in the opinion of the court that tenancies at will by the common law might be determined without notice to quit.

If the plaintiff was a tenant at will, it was by the common law. He occupied merely by the consent of the owner, without paying or agreeing to pay any rent. By the conveyance of the premises to the defendant he became a tenant at sufferance: *Benedict v. Morse*, 10 Met. 223. Such a tenant cannot maintain trespass *quare clausum* for a peaceable entry.

Motion and exceptions overruled.

APPLETON, C. J., and RICE, CUTTING, and KENT, JJ., concurred.

TENANCY AT WILL IS TERMINATED BY SALE OF PROPERTY: *Dane v. Dane*, 75 Am. Dec. 195; see also *Dillon v. Brown*, 71 Id. 700.

DEED IS TO BE CONSTRUED MOST STRONGLY IN FAVOR OF GRANTEE: *Commonwealth v. Erie etc. R. R. Co.*, 67 Am. Dec. 471, note 485, where other cases are collected.

GRANTEE'S RIGHT OF ELECTION IN CASE OF UNCERTAINTY IN DESCRIPTION IN DEED: *Armstrong v. Mudd*, 50 Am. Dec. 545, note 548, where this question is considered.

REPUGNANT CLAUSES IN DESCRIPTION IN DEED: See *Norwood v. Byrd*, 48 Am. Dec. 406, note 410, where other cases are collected.

STOCKWELL v. DILLINGHAM.

[50 MAINE, 442.]

CONTRACT MADE BY COPARTNER IN NAME OF FIRM, PRIMA FACIE BINDS FIRM, unless it is outside the business of the firm.

WHERE PARTNER CONTRACTS DEBT, REPRESENTING TO CREDITOR THAT IT IS FOR BENEFIT OF FIRM, the firm is liable, whether such representation is true or false, if the transaction is within the scope of the partnership business.

TROVER for pine logs. The facts are stated in the opinion.

W. C. Crosby, for the plaintiff.

Rowe, for the defendants.

By Court, APPLETON, C. J. The facts in this case are not open to controversy. The only inquiry is, whether the ruling of the presiding judge upon the facts as disclosed was erroneous.

Both parties claim the logs in controversy under bills of sale from the firm of Brown & Lee. The defendants' title is prior in time, and consequently prior in right, unless impeached.

The bill of sale from Brown & Lee to Chase is *prima facie* to be deemed the act of the firm and binding on them. "When a contract," remarks Mr. Justice Story, in *United States Bank v. Binney*, 5 Mason, 176, "is made in the name of the firm, it will *prima facie* bind the firm, unless it is *ultra* the business of the firm." The bill of sale must be deemed then as conveying a good title, unless impeached.

The evidence discloses that "on November 2, 1858, Lee, of the firm of Brown & Lee, represented to the defendants that he wanted to raise money to pay one Chase, for money he [Lee] had had of Chase to pay Brown & Lee's bills; that Chase wanted to go to California, and he had no other means to raise the money to pay him." It also appeared from the testimony of Dillingham, given for the defense, that "he [Dillingham] had no information that it was Lee's private debt—that he understood from Lee that he had borrowed money of Chase to pay the bills of Brown & Lee, and that Chase had loaned the money to Lee." But this does not impeach the defendants' *prima facie* title.

The firm is liable for the false and fraudulent representations of any of its members relative to matters falling within the scope of its business: Lindley on Partnership, 250. Much more, for the representations, which are true. Whether true

or not, therefore, the defendants had a right to regard them as true, and so regarding them, to act upon their truth.

Upon the representations of Lee, the defendants advanced their note upon the faith of a bill of sale given by Lee in the name of Brown & Lee, which the plaintiff seeks to avoid, on the ground that it was the private debt of Lee, and not the debt of the firm, for which the advance was made. The statements of Lee show the money received went to pay the debts of the firm. The defendants understood it was the debt of the firm, and not of Lee, which the money raised was to pay. "The firm is liable for goods, though they may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm:" Lindley on Partnership, 233. "Thus, if the money is in fact borrowed for the partnership business, or it is in fact applied to the partnership business, in the absence of all controlling circumstances, the partnership will be bound therefor; since the fair presumption is, that it was intended by the partner to pledge the partnership credit, and not merely his individual credit, whether the partnership was known to the lender or not:" Story on Partnership, sec. 139. "The firm is liable where one of the firm borrows money (not expressly on his individual credit), and it is shown that it was borrowed for and appropriated to the use of the firm:" *Church v. Sparrow*, 5 Wend. 223; *Tucker v. Peaslee*, 36 N. H. 167. The language used was sufficient to satisfy the defendants that it was a firm debt, for the payment of which they advanced their note. They are not responsible for the truth of Lee's statements. As they were made in the course of business, if untrue, the firm must be the sufferer. The finding of the judge was, that the defendants were *bona fide* purchasers; and that finding is not adverse to the facts as reported, and must conclude the parties.

Exceptions overruled.

CUTTING, DAVIS, KENT, and WALTON, JJ., concurred.

LIABILITY OF PARTNERSHIP FOR DEBTS CONTRACTED WITHIN APPARENT SCOPE OF PARTNERSHIP BUSINESS: See *Bromley v. Elliott*, 75 Am. Dec. 182, note 193, where other cases are collected.

PARTNER MAY BIND PARTNERSHIP IN ALL TRANSACTIONS RELATING THERETO, and in the course of its business: *Wright v. Boynton*, 73 Am. Dec. 319, note 323, where other cases are collected.

KELLEY v. JENNESS.

[50 MAINE, 455.]

WHERE MORTGAGOR WITH WARRANTY PAYS OFF PRIOR MORTGAGE on the same land, the payment will inure to the benefit of the second mortgagee. But if the money with which such payment is made is furnished in part by a third person, who takes an assignment of the mortgage to himself, and for his own benefit, a resulting trust in his favor attaches at once to the conveyance from the first mortgagee to the mortgagor, to the extent of the portion of the mortgage debt actually paid off by his money.

TRUST ESTATE IS NOT SUCH AFTER-ACQUIRED TITLE AS INURES TO BENEFIT OF GRANTEE of the trustee who makes the conveyance in his individual capacity. And an implied trust is governed by the same general rules as other trusts.

BILL in equity. The facts are stated in the opinion.

A. W. Paine, for the plaintiff.

Rowe and Bartlett, for the defendants.

By Court, KENT, J. Horace Jenness, on the second of December, 1852, made his deed of mortgage to Webster Kelley, the intestate, of a township of land. The deed was in the usual form, and contains the usual covenants of general warranty. It was given to secure payment of a note for eight thousand dollars, given by Jenness to Kelley. The deed was acknowledged and delivered on the fifteenth of June, 1853. At this time, there was an incumbrance on the township, created by a prior mortgage to secure a note to S. H. Blake for seven thousand six hundred and sixty-five dollars and ninety-seven cents, given by Clark, who then had the title.

The original bill alleges that Blake, in July, 1860, received the amount then due, on that prior mortgage, from Jenness, and thereupon assigned the note and mortgage to Jenness, who still holds the same.

On such a state of facts, there could be no doubt that such payment would inure by way of estoppel, or implied trust, to the benefit of Jenness's grantee, to whom he had conveyed with covenants of warranty. The mortgage, which was paid, was an incumbrance, which was covered by the warranty, and it was the duty of Jenness to pay it, and remove the incumbrance. The assignment of the mortgage to him could give him no right to set it up against his grantee, but if of any effect, it would be held only in trust for Kelley. Equity would treat it as paid, and discharged as to Kelley, on the simple principle that a person purchasing in and taking the assign-

ment to himself, of an incumbrance which he was himself under an obligation to discharge, acquires, in equity, no title against one to whom he was bound to remove the incumbrance. The common-law doctrine of estoppel, where there are covenants in a deed, leads to the same conclusion: *Kellogg v. Wood*, 4 Paige, 589; *Van Horne v. Crain*, 1 Id. 459; *Bradley v. George*, 2 Allen, 392.

But the respondents in this case say that there are other facts on which their rights must depend.

It is clearly established that the assignment by Blake of his mortgage was made to Jenness on the day the money was paid. It is also proved, and not denied, that Jenness, on the same day, executed an assignment, with a blank for the name of the assignee, and that afterwards the name of R. D. Hill, the respondent, was inserted therein.

We think that it is also proved that the sum of four thousand six hundred and fourteen dollars and fifty-eight cents, which was paid to Blake on the day of assignment, was furnished by Hill, was his money, and was paid by his agent to obtain an assignment of the mortgage to himself and for his benefit. Jenness, on that day, paid nothing. It was not a loan of that money from Hill to Jenness, to enable him to pay the mortgage. Hill paid the money to obtain the assignment of the mortgage to himself, for his own use and benefit. Jenness negotiated the business until the time of payment, but he did it, as he says, for Hill. His object was to have the mortgage in some person other than the person then holding it. But Hill manifestly paid the money, not for Jenness's benefit, but for his own. He expected an assignment to himself or to some one for his benefit. It would doubtless have been so made, if Mr. Blake had not promised the attorney for the complainant that he would assign to no one but Jenness.

On this state of facts, it is clear that, as between Jenness and Hill, the assignment to Jenness was for the use of Hill, and that a resulting trust attached at once to the conveyance in favor of Hill. It is a settled doctrine that when a man purchases an estate with his own money, and the deed is taken in the name of another, a trust is implied by law, and this trust may be proved by parol. There are numerous authorities in this state, and in England, and in other states, which sustain this principle. It is entirely unnecessary to cite them. They can be found in any digest.

But it is contended by the complainant that, although this

may be so as between the two parties named, yet, that Kelley's legal rights could not be affected, and that when the legal assignment was made to Jenness, it instantly inured to the benefit of his grantee, by force of the estoppel created by his covenants. The question then is, Did Jenness acquire such a title that, notwithstanding the implied trust, it inured to the benefit of Kelley?

It is important to observe the relations of all these parties. Kelley was not a subsequent purchaser, nor a creditor who had levied on the land, and therefore not within the saving provision of the statute in relation to implied trusts: R. S., c. 73, sec. 12. His right was to redeem that mortgage. This was all that was conveyed to him in fact. His other rights rested upon the covenants in the deed to him. His rights were not impaired, or his situation changed, by the transfers of the mortgage from Blake to Hill. The complainant does not contend that they were, but insists that, by operation of law, the estate she represents has obtained the payment and discharge of the mortgage, without paying any part of it. This, as we have seen, would have been the result, both legal and equitable, if Jenness had in fact and truth paid it, and the equitable rights of another party had not come in question.

Is a trust estate, or a conveyance charged with a trust, such an after-acquired title as will inure to the benefit of one to whom the trustee had before conveyed in fee with covenants of warranty?

In the case of *Jackson v. Mills*, 13 Johns. 463, it was held, where one took a deed merely as trustee for another, although absolute in form, and the consideration was paid by the other, and thereupon he gave him a deed, that the latter deed was a mere execution of his trust, and did not operate as an estoppel to any title he might thereafter acquire in his own right to the same lands.

The case of *Jackson v. Hoffman*, 9 Cow. 271, reaffirms the above case, and decides that estoppels do not apply, except between parties acting in the same character. In that case, the purchase was made by one in his individual capacity, and the covenant was made by him as administrator. *Sinclair v. Jackson*, 8 Id. 565, sustains the same view, and the court say: "A conveyance, to operate as an estoppel, it is necessary that it should be in the same right with the former one. To estop, a conveyance must be by one claiming under and in right of

identically the same power and the same estate as he first conveyed."

If, as we have seen in the case before us, Jenness took the assignment of the mortgage charged with a trust, it was not in the same character and in the same estate as in his deed to Kelley. He was here a mere trustee. There can be no division or separation in the effect of the assignment. He did not take a conveyance and afterwards have ingrafted thereon a trust, allowing the legal estate to vest absolutely and for a time, before any trust arose. The assignment was charged with the trust as soon as executed.

Is a trust estate such an after-acquired title as will inure by way of estoppel? It would hardly be contended that a conveyance to one as trustee for the use and benefit of a charitable association or a religious body would thus inure. Nor where a conveyance creates a trust and declares it fully in the deed, and the purpose is to give the whole benefit of the estate to a party named and no personal benefit to the trustee.

But an implied trust is equally a trust for the benefit of another, as when the trust is declared in writing. It may require a different mode of proof to establish its existence, and it may be limited in case of purchasers without notice. But being established, it follows the general rules, and is subject to the doctrines applicable to trusts.

A case very similar to this is *Burchard v. Hubbard*, 11 Ohio, 316. It was where a person who had no title, conveyed by deed of warranty, and afterwards received title as trustee from the owners, for the purpose of transmitting it to a *bona fide* purchaser. The court say that in such a case, the doctrine of estoppel does not apply; that a mere naked title was all that passed through him; that the title was conveyed as a mere matter of convenience; that it constituted him a mere trustee of the naked legal title; that a trust resulted to the party who paid the money; that if he had acquired for himself the legal and equitable title, he would have been estopped by reason of the covenants, but it being a mere trust estate, no such estoppel can apply.

A doctrine analogous to this is found in those cases where the party taking the deed is a mere conduit of the title, an instrument by whom the title is to be taken to carry out the understanding of the parties, he, in fact, having no real interest. In such cases, it has been held that the title would

not inure to the benefit of a former grantee: *Runlet v. Otis*, 2 N. H. 167; *Marsh v. Rice*, 1 Id. 167.

Another analogy may be found in the well-established doctrine that the widow of a mere trustee is not dowerable in equity of the trust estate. All these cases rest upon the general principle that the estate must be acquired by the warrantor or husband, in fact and substance as his own property, without intervening rights in third parties, and not as mere trustee for another's use, or as a mere conduit of title. Whilst the law is careful to see that an after-acquired title, purchased and paid for by the warrantor, shall inure, it is equally careful to guard against any unequitable result by enforcing the rule, where the substance is wanting and the rights of others are impaired.

The complainant contends that the trust is not sustained, because, she says, the whole consideration of the transfer did not come from Hill.

It was decided in some of the earlier cases that unless the whole consideration moved from one person, no implied trust would arise. But this doctrine has been repudiated. It is now held that such a trust may arise where several persons furnish the money, if the portions of each can be defined clearly. But where this is uncertain, and no satisfactory evidence is offered showing the portion of each, no trust can be established: *Baker v. Vining*, 30 Me. 121.

The same case also clearly states the foundation of the rule as to implied trusts to be payment of the money. It raises a trust to the extent of that payment, if the same was due and rightfully paid; but not beyond this.

The proof in the case shows that the amount actually paid by Hill at the time of the assignment was four thousand six hundred and fourteen dollars and fifty-eight cents; the consideration named in the assignment to Jenness was five thousand one hundred and thirty-eight dollars. On examination of the evidence, we are satisfied that Jenness and others had paid to Blake certain sums amounting to one thousand seven hundred dollars, which had not been indorsed on the note. There was an understanding, not very definite, that some extra interest or consideration for delay should be paid or allowed Blake, and he held this sum to await a settlement. It was arranged, as Mr. Blake testifies, that he should retain these sums, amounting to one thousand seven hundred dollars; but as this sum exceeded by more than five hundred dollars

what was finally fixed upon as his extra, he would take, and did take of Jenness, the sum of four thousand six hundred and fourteen dollars and fifty-eight cents. By this arrangement, the five hundred dollars (more or less) was deducted from the amount due on the mortgage.

It is clear that the whole one thousand seven hundred dollars was paid to Blake towards the mortgage debt, and the understanding as to extra interest. This was paid by Jenness, or those interested to pay it. The five hundred dollars balance at least should have been indorsed on the note, for it was paid in on that debt, and it was admitted that, at most, but one thousand one hundred dollars of the one thousand seven hundred dollars was required "to protect the extra interest," leaving five hundred dollars, more or less, to be appropriated towards the principal and legal interest. Blake agreed to consider it as a payment and received the sum apparently due, less this sum of five hundred dollars. We can see no difference in effect, if he had actually indorsed the amount on the note.

It will not be disputed that if Jenness had paid all the debt, except one hundred dollars, and Hill had paid this one hundred dollars to Blake, and to Jenness the seven or eight thousand dollars which had been before paid by him, that no implied trust on an assignment to Jenness would arise, beyond the one hundred dollars. As between Kelley and Jenness, as we have seen, it was Jenness's duty to pay all the debt. Whatever he did pay in fact on this note to Blake was a payment for the benefit of Kelley. If Hill did afterwards pay Jenness the five hundred dollars, it gave him no right against Kelley. It is the same in effect as if he had paid to Jenness the amount of any prior payments made years before to Blake. What had been paid by Jenness or others on the note before assignment, which Blake was bound to account for as payment, was fixed in favor of Kelley, and must be accounted for, and no resulting trust as to such payments could arise in favor of Hill. Whether any more than the balance of five hundred dollars of the one thousand seven hundred dollars should be allowed as payment on the note, we are not now called upon to determine. If any question on this point is made, it may be determined on the coming in of the master's report.

It being admitted that the complainant has a right to redeem, a decree to that effect may be entered. The case will be referred to a master to determine the amount due on the

principles before stated, unless the parties can agree upon the sum. The complainant is entitled to costs.

APPLETON, C. J., and RICE, CUTTING, DAVIS, and WALTON, JJ., concurred.

AFTER-ACQUIRED TITLE OF MORTGAGOR INURES TO BENEFIT OF GRANTEE WHEN: See *Clark v. Baker*, 76 Am. Dec. 449, note 458, where other cases are collected.

RESULTING TRUST, WHEN ARISES: See *Wentworth v. Wentworth*, 72 Am. Dec. 97, note 102, where other cases are collected.

RESULTING TRUST PRO TANTO, ARISES WHEN: See *Baker v. Fining*, 50 Am. Dec. 617, note 624, where other cases are collected.

CUMMINGS v. SMITH. CUMMINGS v. HAYES.

[50 MAINE, 503.]

AGREEMENT THAT PENDING ACTION SHALL ABIDE RESULT IN ANOTHER CASE, entered on the docket, binds the parties to it; and the defendant, by entering into such an agreement, waives his right to a trial by jury to determine the damages.

COURT MAY, IN ITS DISCRETION, RECEIVE OR REJECT PLEA PUIS DARREIN CONTINUANCE after one continuance.

PLEAS PUIS DARREIN CONTINUANCE MUST HAVE SAME CERTAINTY as to time and place as other pleas. If such a plea does not allege the day on which the matter pleaded happened, it is bad.

EXCEPTIONS NEVER LIE TO DECISION OF COURT UPON MATTERS WITHIN ITS DISCRETION.

CASES presented on exceptions. The opinion states the facts.

Shepley and Dana, for the plaintiff.

Smith, for the defendants.

By Court, APPLETON, J. It appears that Cummings, the original plaintiff, in his life-time commenced suits against the defendant and others, as indorsers of certain promissory notes. The first action, *Cummings v. Herrick*, came on for trial, a verdict was rendered in favor of the plaintiff, and the cause was continued on the report of the presiding judge. An agreement was then made between the parties to the present action to abide the decision in *Cummings v. Herrick*, and a memorandum thereof was entered upon the docket under the action. After a hearing before the law court, judgment was rendered on the verdict in *Cummings v. Herrick*, 43 Me. 203.

When the entry of judgment on the verdict was made in

the suit of *Cummings v. Herrick*, the plaintiff, by virtue of his agreement, was entitled to the same judgment in this action. Both parties were bound as much by that agreement as by any other, while it was in full force and subsisting. The defendant thereby waived his right to be heard by a jury. He consented that in a certain contingency judgment should be rendered against him. He had lost his opportunity to defend the suit, and the only remaining inquiry related to the assessment of damages. The defendant, after a default, has no right to claim a trial to determine the damages. They are to be assessed by the court, unless the plaintiff claims a hearing by the jury on that question: *Price v. Dearborn*, 34 N. H. 481. In the present case, the defendant is in no better position than if he were defaulted; for, by virtue of his agreement, judgment was to be rendered against him.

The defendant claimed to file certain pleas *puis darrein* continuance. But after one continuance, it is a matter of discretion to receive or reject such plea: *Rowell v. Hayden*, 40 Me. 582. If, therefore, the plea was not seasonably filed, its rejection was purely discretionary with the court.

But to constitute a valid plea of this description, it must have the same certainty as to time and place with other pleas. "It is no good plea to say *puis darrein* continuance, such a thing happened, but it ought to be precise in the day:" 7 Bac. Abr., ed. 1856, 687. "For in pleading a thing after the last continuance it is not good pleading, *quod post ultimam continuationem*, such a thing happened, but it ought to allege precisely the very day, viz., from such a day to such a day: *Ever v. Moile*, Yelv. 140. The pleas filed are entirely defective in this respect.

From the evidence offered and received, it would seem that all the alleged facts upon which the defendant relies happened long before the last continuance. Nor is this inconsistent with the pleas. Whether, therefore, the defendant should be allowed to plead such facts was a matter discretionary with the court. The exercise of this discretion is never matter of exception.

Besides, the defendants only claimed "to be heard in damages by a jury," and the exceptions taken are to the overruling of this motion. But as has been seen, the defendant, by reason of his agreement, was in no better condition than that of a defendant defaulted, and could not claim to have damages assessed by a jury. He had agreed judgment should be rendered against him, and it was.

The defendant was allowed for the amount paid by Poor.

This payment was neither made nor received in full discharge of the execution.

Exceptions overruled.

TENNEY, C. J., and RICE, GOODENOW, DAVIS, and WALTON, JJ., concurred.

PLEA PUIS DARREIN CONTINUANCE, WHEN AND HOW PLEADABLE: See *Adams v. Filer*, 73 Am. Dec. 410, note 421; *Broughton v. Bradley*, Id. 474, note 484, where other cases are collected.

TRIAL BY JURY, IN WHAT CASES MAY BE DISPENSED WITH: See *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 178, note 185. See also *Scott v. Nichols*, 61 Id. 503, note 508, where other cases are collected.

DECISION ON MATTER OF DISCRETION IS NOT REVIEWABLE BY APPELLATE COURT: See *Riddle v. Gage*, 75 Am. Dec. 151, note 153, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Hanley v. Sutherland*, 74 Me. 213, to the point that in case of default, damages may be assessed by the court or by the jury, and the option as to the mode of assessment is with the plaintiff, and not the defendant.

UNION BANK v. STONE.

[50 MAINE, 595.]

COURT MAY CALL JURY'S ATTENTION TO FACT THAT DEFENDANT DID NOT TESTIFY in the case, and may instruct them that they may consider that fact and give to it such weight as they think it deserves, in an action against the indorser of a promissory note, on the trial of which is adduced proof of demand and notice to the defendant, where the allegation of due notice is controverted by him.

NOTARY MAY BE PERMITTED TO TESTIFY AS TO HIS USUAL COURSE OF PROCEEDING and customary habits of business.

TESTIMONY OF NOTARY PUBLIC THAT AFTER MATURITY OF NOTE HE MADE OUT NOTICES to the indorser and gave them to his employee to be delivered on the last day of grace; that after he had so delivered the notices, or had been informed by his employee that he had delivered them, his notarial records were made out; that such records were usually made out on the evening of the day the notices were served, or on the next morning; that the records in question were made out by said employee and signed by said notary, taken with the testimony of said employee that he was in the habit of delivering notices for said notary; that he did not recollect of doing it in this particular instance; that he seasonably delivered all notices handed to him for that purpose; that he made out the notarial records in controversy at the time; and that they were signed by the notary—is, in the absence of any evidence to the contrary, sufficient to prove notice to the indorser.

ASSUMPSIT. The opinion states the case.

Barrows, in support of the exceptions.

Fox and Barnes, contra.

By Court, APPLETON, J. This is an action against the defendant as an indorser. To prove notice, the plaintiffs introduced the notarial records of Nathaniel Badger, a notary public, and called said Badger, who testified that he made out notices to the defendant, a copy of which was in his book of records and was in due form; that he gave them to Benjamin S. Swift, then in his employ, to deliver to the defendant, on the last day of grace; that after he had delivered notices, or had been informed by Swift that he had delivered them, his notarial records were made out; that this was usually done on the evening of the day when and after such notices were given, or on the next morning, and that his records in the present case were written out by Swift and signed by himself.

From the voluminous testimony of Swift, it appeared that he was in the habit of delivering notices for Badger; that he had no definite recollection of doing it in this particular instance; that all notices finally handed him for delivery he seasonably delivered to the persons to be notified; that after this was done, he informed Badger what he had done; that the information thus given was true; that he made out the notarial records in controversy at the time; and that they were signed by Badger.

The defendant, though present in court, was not a witness, and though notified, did not produce the notice alleged to have been delivered him.

The presiding judge in his instructions to the jury remarked that "it was a matter for their consideration, if Swift copied the record in this case, on the same day, whether he did not know that the matters therein stated were true." This was a very natural suggestion, in the utterance of which nothing objectionable is perceived. Swift's memory must have egregiously failed, if he did not know the truth or the falsehood of the record he was then making.

The objection mainly relied upon is found in the remark "that the fact that the defendant did not appear to testify in the case was a matter they might consider, and give such weight to it as they thought it might deserve."

This presents a question of much importance, and which, as parties are now witnesses, will or may not unfrequently arise in the trial of causes.

It is to be observed that the judge called the attention of the jury to the fact of the defendant's not testifying, as one proper for their consideration, leaving its probative force and

effect to their judgment, and without indicating any inference to be drawn therefrom, whether favorable or adverse to either party. It was a fact in the case, and he called their attention to it.

If the jury regarded the defendant's omission to testify as an immaterial and unimportant fact, or if they drew from it an inference favorable to the defendant, he would have no ground of complaint. Certainly not, in case they regarded it as immaterial and unimportant.

They might, however, though not so specifically instructed, have deemed the defendant's absence from the stand as a circumstance entitled to some weight (and of that weight they were the special judges), and as tending to strengthen, in a greater or lesser degree, the case against him. If they did so, would the defendant have just cause of exception?

How stood the case? There was evidence proving, or tending to prove, that a notice of demand and non-payment had been given the defendant. He had been notified to produce it, and did not. He was present and was not a witness. If he had never received such notice he knew it, and knowing it, would be little likely to omit an opportunity of stating a fact thus conclusively in his favor. The evidence tended strongly to charge him. A word from his lips might exonerate him from all liability. The pressure of adverse testimony seemed to demand the negation of all notice, if none had been given. If notice had been received, and the defendant knew it, he might well be silent. The utterance of the truth would establish the plaintiffs' claim. His only defense would be in the failure of proof on the part of his adversary. If he were a witness, he must either state the truth or a falsehood. If he testified truly, his hope of a successful defense was at an end. The defendant does not offer his own testimony. He prefers the adverse inferences, which he cannot but perceive may be drawn therefrom to any statements he could truly give, or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged, by the truth, to give.

The fact of not testifying was obvious to the jury. They could not fail to perceive that here was evidence tending to charge the defendant as indorser—that, if in fact, no notice was received, here was an opportunity to deny its reception—yet the defendant failed to make such denial. A witness on

the stand, if he answer evasively, would not the jury regard such evasion as a discrediting circumstance? If a party is silent when interrogated, is not such silence tantamount to confession? *Habes confitentem reum*. Here the party declined to become a witness, and to exonerate himself from liability. If he truly could, would he not have been likely to do it?

No court could perceive such a fact, without attaching some degree of importance—more or less—to its existence, according to the necessity of the testimony and the emergencies of the defense. No judge exists, who would not, if the trial had been before him, regard this as a fact bearing on his decision. To direct a jury to disregard it would be to direct them to disregard a fact existent, material, and probative. However much so directed, they could not fail to perceive, and perceiving, could not avoid regarding it.

The importance of any given fact or circumstance is ever varying—according to the ever-changing facts and circumstances with which it is surrounded. The presiding judge gave no specific directions as to the effect of this fact on the issue or of the inferences to be drawn therefrom. He merely adverted to it, leaving its significance to be measured and determined by the jury. Of all this, the defendant assuredly cannot complain.

In *Tufts v. Hatheway*, 4 Allen (N. B.), 63, the defendant might have been called as a witness, he knowing all the facts, but he was not. The presiding judge instructed the jury that they might infer, if the defendant had been called, that his evidence would not have benefited his case. In delivering the opinion of the supreme court of New Brunswick, Carter, C. J., says: "We cannot consider this a misdirection. It is an inference so naturally arising to a jury themselves possessing ordinary sense and acumen, that such a remark might be hardly necessary; but it is clearly within the discretion of the judge on the evidence which had been adduced, and on that which had not been adduced." So it seems the omission of the defendant in a criminal case to call as a witness a person in his employ and interest, who could probably explain facts, already proved, tending to show the defendant's guilt, if capable of being explained favorably to the defendant, may properly be commented on by the prosecuting officer, in his argument to the jury, as bearing upon the question of the defendant's guilt: *Commonwealth v. Clark*, 14 Gray, 367. When the truth or falsehood of a fact that is material is known to a party, to

whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth: *Robinson v. Blen*, 20 Me. 109.

It is allowable to permit a notary to state his usual course of proceeding and his customary habits of business. In *Miller v. Hackley*, 5 Johns. 383 [4 Am. Dec. 372], Van Ness, J., says: "The bill, when presented for acceptance, was refused, and due notice given to the defendant. The evidence to this point consisted of the deposition of the notary, who stated that he presented the bill for acceptance, and protested it for non-acceptance; that it was his usual practice, as a notary, on the evening of the day of the protest, and in all cases of protest, to give notice in writing to the indorsers residing at a distance, by putting such notice in the post-office, directed to the party at his place of residence; and he had no doubt notice in this case was duly given, though, at that distance of time, he could not recollect positively; and that it was possible he might have given the notice to the holder to be forwarded."

"This evidence was sufficient, in the first instance, to support the averment of notice, and there being nothing to affect it, it will support the verdict."

Of a similar tenor are the remarks of Shaw, C. J., in *Shove v. Wiley*, 18 Pick. 561.

It is not necessary to notice particularly the objections to certain interrogatories and answers in the deposition of Swift, to which exceptions have been taken, as, upon examination, we are satisfied they are entirely without foundation.

A careful perusal of the evidence in the cause leaves no reasonable doubt on our minds that the defendant had due notice. The motion for a new trial must therefore be overruled.

Exceptions and motion overruled.

RICE, GOODENOW, DAVIS, and WALTON, JJ., concurred.

NOTARY'S CERTIFICATE OF PROTEST AS EVIDENCE OF NOTICE TO INDORSER: See *Leicester Falls Bank v. Leonard*, 69 Am. Dec. 49, note 54, where other cases are collected.

NOTICE TO INDORSER, WHAT SUFFICIENT: See *Stephenson v. Dickson*, 62 Am. Dec. 366, note 372, where other cases are collected.

ENTRIES MADE BY NOTARY IN USUAL MODE OF BUSINESS and authenticated by his oath, are admissible in evidence, although he cannot remember the facts stated in such entries: *Spann v. Baltzell*, 46 Am. Dec. 346.

NOTARY'S CLERK, WHEN PRESENTMENT AND DEMAND MAY BE MADE BY: See note to *Dupré v. Richard*, 43 Am. Dec. 222.

stances in the case, is an unreasonable use of the water, not whether it is unreasonably detained for the specific purpose of repair, or by reason of some extraordinary occurrence.

On this point, we think the jury may have been misled by the instruction of the court, and therefore the exceptions must be sustained.

APPLETON, C. J., and DAVIS, KENT, and WALTON, JJ., concurred.

RIPARIAN PROPRIETOR'S RIGHT TO USE AND DETAIN WATER.—Certain questions related to the right of riparian proprietors to use and detain water have been already treated in this series, and it is not our purpose now to reconsider them: See note to *Gardner v. Newburgh*, 7 Am. Dec. 531, on "property in water;" note to *Heath v. Williams*, 43 Id. 269, on "rights acquired by prior appropriation of water;" and note to *McCoy v. Donley*, 57 Id. 684, on the "rights and liabilities of owners of dams," although these notes dwell to some extent upon the subject under discussion, viz., the extent to which riparian proprietors may use and detain water.

RIPARIAN PROPRIETOR'S RIGHT TO NATURAL FLOW OF STREAM.—The general rule is well settled, that independent of limitation by grant, license, prescription, or otherwise, every riparian proprietor has the right to have the stream flow in its natural channel, without diminution or alteration: 3 Kent's Com. *439; Angell on Watercourses, sec. 95; Gould on Waters, sec. 204; note to *Gardner v. Newburgh*, 7 Am. Dec. 532; *Tyler v. Wilkinson*, 4 Mason, 397; *Bealey v. Shaw*, 6 East, 208, 214; *Wright v. Howard*, 1 Sim. & Sta. 190; *Mason v. Neill*, 3 Barn. & Adol. 304; 5 Id. 1; *Wood v. Waud*, 3 Exch. 748; S. C., 13 Jur. 472; *Embrey v. Owen*, 6 Exch. 352; *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839, 854; *Hendricks v. Johnson*, 6 Port. 472; *Potier's Ex'rs v. Burden*, 38 Ala. 651, 654; *King v. Tiffany*, 9 Conn. 162, 168; *Buddington v. Bradley*, 10 Id. 213; S. C., 26 Am. Dec. 386; *Wadsworth v. Tillotson*, 15 Conn. 366; S. C., 39 Am. Dec. 391; *Evans v. Merriweather*, 3 Scam. 492; S. C., 38 Am. Dec. 106; *Plumleigh v. Dawson*, 1 Gilm. 544; S. C., 41 Am. Dec. 199; *Rudd v. Williams*, 43 Ill. 385; *Druley v. Adam*, 102 Id. 177; *Case v. Weber*, 2 Ind. 108, 110; *Dilling v. Murray*, 6 Id. 324; S. C., 63 Am. Dec. 385; *Mitchell v. Parks*, 26 Ind. 354; *Shamleffer v. Council Grove etc. Mill Co.*, 18 Kan. 24; *Pillsbury v. Moore*, 44 Me. 154; S. C., 69 Am. Dec. 91; *Mayor etc. of Baltimore v. Appold*, 42 Md. 442; *Pratt v. Lamson*, 2 Allen, 275, 285; *City of Springfield v. Harris*, 4 Id. 494; *Cowles v. Kidder*, 24 N. H. 364; *Tillotson v. Smith*, 32 Id. 90; S. C., 64 Am. Dec. 355; *Ten Eyck v. Delaware etc. Canal Co.*, 18 N. J. L. 200; S. C., 37 Am. Dec. 233; *Arnold v. Foot*, 12 Wend. 330; *Cooper v. Williams*, 4 Ohio, 253; S. C., 22 Am. Dec. 745; *Taylor v. Welch*, 6 Or. 198; *Coffman v. Robbins*, 8 Id. 278; *Hoy v. Sterrett*, 2 Watts, 327; S. C., 27 Am. Dec. 313; *Omelvany v. Jaggars*, 2 Hill (S. C.), 634; S. C., 27 Am. Dec. 417; *Rhodes v. Whitehead*, 27 Tex. 304; *Martin v. Bigelow*, 2 Aik. 184; S. C., 16 Am. Dec. 696; *Vliet v. Sherwood*, 35 Wis. 229; *Lux v. Haggitt*, 10 Pac. Rep. 674, 753. "Independent of any particular enjoyment used to be had by another," says Lord Ellenborough in *Bealey v. Shaw*, *supra*, "every man has the right to have the advantage of a flow of water in his own land, without diminution or alteration;" and again it is said in *Wright v. Howard*, *supra*, that "every proprietor has an equal right to use the water which flows in the

stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. . . . Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place, and at its usual level:" Gould on Waters, sec. 204. "Even though he makes no use of the water, no one has a right to disturb its natural flow:" *Olney v. Tenner*, 2 R. I. 211; S. C., 57 Am. Dec. 711; nor is his right to the natural flow affected by the question as to the use to which he will put the water: *Vansickle v. Haines*, 7 Nev. 249; nor is it enough that one who has diverted the water has left what could be utilized by expense and trouble: *Cooker v. Bragg*, 10 Wend. 260; S. C., 25 Am. Dec. 555; in which latter case it is also said that "a person through whose farm a stream naturally flows is entitled to have the whole pass through it, though he may not require the whole, or any part of it, for the use of machinery."

The peculiar doctrine concerning appropriation, existing in the Pacific states and territories, needs a reference in this connection. It is fully treated of in the note to *Heath v. Williams*, 43 Am. Dec. 282, and the conclusion there reached is, that "a prior appropriator, under the California doctrine, is entitled to the exclusive use of the water to the extent of his appropriation, without diminution or material alteration in quantity or quality, and will, to that extent, be protected against subsequent appropriators, above and below, and may have all legal remedies for an invasion of his rights. He is entitled to the natural flow of the stream down to the head of his ditch, without diversion or material interruption to his injury." See also *Eddy v. Simpson*, 3 Cal. 249; S. C., 58 Am. Dec. 408; *Bear River etc. Min. Co. v. New York Min. Co.*, 8 Cal. 327; S. C., 68 Am. Dec. 325; *White v. Todd's Valley Water Co.*, 8 Cal. 443; S. C., 68 Am. Dec. 338.

DIVERSION OF WATER BY RIPARIAN PROPRIETOR.—It follows from what has been said, that a riparian proprietor has no right to divert the water from the stream, unless he restores it without material diminution to its natural channel before it reaches the land of lower proprietors: 3 Kent's Com. *439; Angell on Watercourses, sec. 97; Gould on Waters, sec. 213; *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839, 856; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Stein v. Burden*, 29 Ala. 127; S. C., 65 Am. Dec. 394; *Dilling v. Murray*, 6 Ind. 324; S. C., 63 Am. Dec. 385; *Plumleigh v. Dawson*, 1 Gilm. 544; S. C., 41 Am. Dec. 199; *Blanchard v. Baker*, 8 Greenl. 253; S. C., 23 Am. Dec. 504; *Pettibone v. Smith*, 37 Mich. 579; *Van Hoesen v. Coventry*, 10 Barb. 518; *Norton v. Volentine*, 14 Vt. 239; S. C., 39 Am. Dec. 220; *Canfield v. Andrew*, 54 Vt. 1. But if a riparian proprietor increases the flow of water, equal to the quantity which he diverts, he is not liable to a lower proprietor for the diversion: *Elliot v. Fitchburg R. R.*, 10 Cush. 191; S. C., 57 Am. Dec. 85; *Society for Establishing Useful Mfg. v. Morris Canal Co.*, 1 Saxt. 157; S. C., 21 Am. Dec. 41.

RIPARIAN PROPRIETOR'S RIGHT TO REASONABLE USE OF WATER.—The foregoing general rule, that every riparian proprietor has an equal right to the use of the water as it is wont to run, without diminution or alteration, is not, however, true in its strict sense, but subject to a well-recognized limitation that there may be a reasonable use of the water for domestic, agricultural, and manufacturing purposes: 3 Kent's Com. *440; Angell on Watercourses, sec. 95, and note; Washburn on Easements, *216 et seq.; Gould on Waters, sec. 205; note to *Gardner v. Neuburgh*, 7 Am. Dec. 532; note to *Heath v. Williams*, 43 Id. 275; *Miner v. Gilmour*, 12 Moo. P. C. 131, 156; *Nuttall v. Bracewell*, L. R. 2 Exch. 1, 9; *Embrey v. Owen*, 6 Exch. 352; *Tyler v. Wilkinson*. 4

Mason, 397; *Union Mill etc. Co. v. Ferris*, 2 Saw. 176; *Union Mill etc. Co. v. Dangberg*, Id. 450; *Twiss v. Baldwin*, 9 Conn. 291, 306; *Wadsworth v. Tillotson*, 15 Id. 386; S. C., 39 Am. Dec. 391; *Agawam Canal Co. v. Edwards*, 36 Conn. 476, 497; *Evans v. Merriweather*, 3 Scam. 492; S. C., 38 Am. Dec. 106; *Plumleigh v. Dawson*, 1 Gilm. 544; S. C., 41 Am. Dec. 199; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *State v. Pottmeyer*, 33 Ind. 402, 404; *Cary v. Daniels*, 8 Met. 466; S. C., 41 Am. Dec. 532; *Pitts v. Lancaster Mills*, 13 Met. 156; *Barrett v. Parsons*, 10 Cush. 367; *Elliot v. Fitchburg R. R.*, Id. 191; S. C., 57 Am. Dec. 85; *Thurber v. Martin*, 2 Gray, 394; S. C., 61 Am. Dec. 468; *Tourtillot v. Phelps*, 4 Gray, 370; *Chandler v. Howland*, 7 Id. 348; S. C., 66 Am. Dec. 487; *Wood v. Edes*, 2 Allen, 578, 580; *Dumont v. Kellogg*, 29 Mich. 420; S. C., 18 Am. Rep. 102; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478, 483; *Tillotson v. Smith*, 32 Id. 90; S. C., 64 Am. Dec. 355; *Norway Plains Co. v. Bradley*, 52 N. H. 86, 109; *Holden v. Lake Company*, 53 Id. 552; *Society for Establishing Useful Mfg. v. Morris Canal Co.*, 1 N. J. Eq. 157; S. C., 21 Am. Dec. 41; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366, 370; *Farnell v. Richards*, 30 Id. 511; *Merritt v. Brinkerhoff*, 17 Johns. 306; S. C., 8 Am. Dec. 404; *Clinton v. Myers*, 46 N. Y. 511; S. C., 7 Am. Rep. 373; *Williamson v. Lock's Creek Canal Co.*, 78 N. C. 156; *McElroy v. Goble*, 6 Ohio St. 187, 188; *Snow v. Parsons*, 28 Vt. 459; S. C., 67 Am. Dec. 723; *Hazeltine v. Case*, 46 Wis. 391; S. C., 32 Am. Rep. 715; *Swift v. Goodrich*, 13 Pac. Rep. 561. In *Embrey v. Owen*, *supra*, Baron Parke, after speaking of the general rule, says: "This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state;" and in *Clinton v. Myers*, *supra*, Grover, J., uses the following language: "When I speak of this common right I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of the water as it flows, for that would be to deny any valuable use of it. There may and there must be allowed, of that which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of other proprietors or not;" so in *Dumont v. Kellogg*, *supra*, Cooley, J., says: "As between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other." "By the general law applicable to running streams," remarks Lord Kingsdown, in *Miner v. Gilmour*, 12 Moo. P. O. 131, "every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

A loss to one riparian owner, which is merely incidental to the proper use

and enjoyment of the water by another proprietor, will, then, obviously not subject the latter to liability: *Wadsworth v. Tillotson*, 15 Conn. 386; S. C., 39 Am. Dec. 291; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; S. C., 57 Am. Dec. 85; *Haskins v. Haskins*, 9 Gray, 390; *Mayor etc. of Baltimore v. Appold*, 42 Md. 442; *Snow v. Parsons*, 28 Vt. 459; S. C., 67 Am. Dec. 723; *Neal v. Henry*, Meigs, 17; S. C., 33 Am. Dec. 125.

It is not the previous use by a riparian proprietor which is the criterion. It is a use which is reasonable and proper, according to the wants and usages of the community: *Haskins v. Haskins*, 9 Gray, 390; or, as well remarked in *Miller v. Miller*, 9 Pa. St. 74, S. C., 49 Am. Dec. 545, 547: "The question does not turn on whether the occupier below, who complains, has sufficient water left for his domestic purposes, or more than he was previously using from the stream, but whether the quantity flowing on his land, which he had a right to use, has been materially lessened or diminished." It is therefore no defense to an action for diverting water from a riparian proprietor to show that no injury would have accrued to him if he had not changed the manner or extent of his use: *Buddington v. Bradley*, 10 Conn. 213; S. C., 26 Am. Dec. 386; *Johason v. Lewis*, 13 Conn. 303; nor has a riparian proprietor the right to use a reasonable quantity of the water for the purposes of his business, but only a right to such use as he can make of the water without materially diminishing it in quantity or corrupting it in quality: *Wheatley v. Chrismen*, 24 Pa. St. 298; S. C., 64 Am. Dec. 657. He may facilitate his enjoyment by ordinary and appropriate means; as by a tube near the stream, receiving water therefrom, and an aqueduct thence to his house and farm: *Chatfield v. Wilson*, 31 Vt. 358; and he may conduct the water to any part of his land, and use the water so diverted for the same purposes and to the same extent that he could use it if it flowed there through a natural channel: *Wheatley v. Chrismen*, *supra*.

WHAT IS REASONABLE USE—EXTENT OF USE IN VARIOUS CASES.—What is a reasonable use plainly depends upon circumstances; upon the subject-matter of the use itself, the size of the stream, the velocity of the current, and the like: *Union Mills etc. Co. v. Ferris*, 2 Saw. 176; *Dilling v. Murray*, 6 Ind. 324; S. C., 63 Am. Dec. 385; *Mayor etc. of Baltimore v. Appold*, 42 Md. 442; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; S. C., 57 Am. Dec. 85; *Thurber v. Martin*, 2 Gray, 394; S. C., 61 Am. Dec. 468; *Timm v. Bear*, 29 Wis. 254. "The limits which separate the lawful from the unlawful use of a stream," says Robinson, J., in *Mayor etc. of Baltimore v. Appold*, *supra*, "it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others." In *Timm v. Bear*, *supra*, Dixon, C. J., said: "What constitutes reasonable use depends upon the circumstances of each particular case, and no positive rule of law can be laid down to define and regulate such use with entire precision, is the language of all the authorities upon the subject. In determining this question, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so also the size of the stream, the fall of water, its volume, velocity, and prospective rise and fall, are important elements to be considered."

Domestic Purposes.—The right of a riparian proprietor to apply the waters of the stream to domestic purposes is undoubted. Many decisions and *dicta*, as seen from the preceding pages, lay down the general doctrine that the use in this respect must be reasonable; but the conclusion reached by some cases is that a greater quantity of water may be devoted by a proprietor to these purposes than to others. In *Evans v. Merriweather*, 3 Scam. 492, S. C. 38 Am. Dec. 106, the court held that to supply his natural wants, as for household purposes, for quenching thirst, and for his cattle, a riparian proprietor might consume the entire stream, but to supply his artificial wants, as for irrigating his land, or propelling his machinery, a different rule existed. This distinction has been observed by other cases: *Stein v. Burden*, 29 Ala. 127; S. C., 65 Am. Dec. 394; *Slack v. Marsh*, 11 Phila. 543; *Baker v. Brown*, 55 Tex. 377, 379; *Rhodes v. Whitehead*, 27 Id. 304, 310; *Fleming v. Davis*, 37 Id. 173, 197; although *Rhodes v. Whitehead*, *supra*, and *Tolle v. Correll*, 31 Id. 362, would place irrigation among the natural wants; but in this respect they are overruled by *Fleming v. Davis*, *supra*. It may be said, then, that according to this view, the consumption of the entire stream to satisfy one's natural wants is a reasonable use. The doctrine, however, is certainly not a well-established one.

Manufacturing Purposes.—No question exists, in the light of the foregoing authorities, as to the right of a riparian proprietor to make reasonable use of the water for mill purposes. In the case of two factories located on a stream, the following rule was laid down by Breese, J., in *Bliss v. Kennedy*, 43 Ill. 67: "That so far as the water is destroyed by being converted into steam, neither of these factories is entitled to its exclusive use; that it is to be divided between them as nearly as may be, according to their respective requirements; that if each factory requires the same quantity of water, it should be equally divided; but while the water is incapable of being thus divided with mathematical exactness, if the jury should find that the upper factory has used more than its reasonable share, or has diverted the water after using it from its natural channel, or so corrupted it as to deprive the lower proprietors of its use to such a degree as to cause a material injury to that factory, it would be ground for damages, and ultimately for an injunction." A mill-owner, it is held in *City of Springfield v. Harris*, 4 Allen, 494, is not responsible for injuries resulting to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream, and the quantity of water usually flowing therein. In *Lord Norbury v. Kitchen*, 3 Fost. & Fin. 292, S. C. 9 Jur., N. S., 132, one riparian proprietor had, by means of a water-wheel, raised and diverted from the premises of another proprietor about a one-fortieth part of the volume of the stream; held: "The question as to whether the quantity of water taken was reasonable must, in a degree, depend upon the entire quantity of water in the stream, and it was for the jury to consider whether the defendant took an unreasonable quantity of the water." In *Olney v. Fenner*, 2 R. I. 211, S. C. 57 Am. Dec. 711, it was held that a riparian proprietor on one bank is entitled to only one half of the water in the stream, as against an owner on the other bank; although "if the same proprietor owns both banks, he has a right to the use of the whole of the water." "The water-power to which a riparian owner is entitled consists of the fall in the stream when in its natural state, as it passes through his land, or along the boundary of it; or in

other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it." *McCallmont v. Whitaker*, 3 Rawle, 84; S. C., 23 Am. Dec. 102; *Plumleigh v. Dawson*, 1 Gilm. 554; S. C., 41 Am. Dec. 199, 201; *Rhodes v. Whitehead*, 27 Tex. 304, 309; *Lawson v. Mowry*, 62 Wis. 219, 236; *Brown v. Bush*, 45 Pa. St. 61, 66; Angell on Watercourses, sec. 95. The stage of the water in a stream in winter and spring is no criterion whatever as to the quantity of water which flows in the summer and fall: *Burden v. Stein*, 27 Ala. 104; S. C., 62 Am. Dec. 758.

Irrigation.—In regard to the right of a riparian proprietor to use water for irrigation, the rule seems to be in England that he may do so, provided he restores the water in a volume substantially undiminished: *Embrey v. Owen*, 6 Exch. 352; *Directors etc. of Swinden Waterworks Co. v. Proprietors of Wills etc. Canal Co.*, L. R. 7 H. L. 697, 704; *Earl of Sandwich v. Great Northern R'y*, L. R. 10 Ch. Div. 707, 711. In this country, he is allowed to use a reasonable quantity: *Gould on Waters*, sec. 217; *Gillett v. Johnson*, 30 Conn. 180; *Blanchard v. Baker*, 8 Greenl. 253; S. C., 23 Am. Dec. 504; *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420; S. C., 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. 269; S. C., 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. 175; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; S. C., 57 Am. Dec. 85; *Farrell v. Richards*, 30 N. J. Eq. 511; *Arnold v. Foot*, 12 Wend. 330; *Müller v. Miller*, 9 Pa. St. 74; S. C., 49 Am. Dec. 545; *Union Mill etc. Co. v. Ferris*, 2 Saw. 176; *Lux v. Haggis*, 10 Pac. Rep. 674, 755; *Swift v. Goodrich*, 13 Id. 561. It is not a natural want: *Union Mill etc. Co. v. Ferris*, *supra*; *Fleming v. Davis*, 37 Tex. 176, limiting *Rhodes v. Whitehead*, 27 Id. 304; *Tolle v. Corroth*, 31 Id. 302. In *Baker v. Brown*, 55 Id. 377, the court says that "the right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a co-proprietor to supply his natural wants, and that of his family, tenants, and stock; as to quench thirst, and to the right to use the water for necessary domestic purposes. Hence, whether the use of the water for the purposes of irrigation is reasonable and lawful as against another would depend upon the facts of the particular case. If the stream should be sufficiently large to admit of necessary irrigation without unreasonably impairing the rights of other proprietors, then it would be reasonable and lawful; otherwise it would not." See also some excellent observations on this question in *Elliot v. Fitchburg R. R.*, *supra*; *Embrey v. Owen*, *supra*.

Miscellaneous.—It has been held that a riparian owner is entitled to take a reasonable quantity of water for the purpose of supplying its engines, and the general purposes of its stations: *Earl of Sandwich v. Great Northern R'y*, L. R. 10 Ch. Div. 707; but see *Attorney-General v. Great Eastern R'y*, 23 L. T., N. S., 344; compare *Garrwood v. New York Central R. R.*, 83 N. Y. 400.

Each person has an equal right to the reasonable use of navigable streams, as public highways: *Davis v. Winslow*, 51 Me. 290.

DETENTION OF WATER BY RIPARIAN PROPRIETOR.—The right of detention of water by a riparian proprietor is intimately connected with his right to the use of water. The right to use necessarily implies the right to detain: *Van Hoesen v. Coventry*, 10 Barb. 518; *Oregon Iron Co. v. Trullinger*, 3 Or. 1. It is therefore well settled that a riparian proprietor may reasonably detain water for his use, although an unreasonable detention is unlawful: 3 Kent's Com. *439; Angell on Watercourses, sec. 115; note to *McCoy v. Danley*, 57 Am. Dec. 696; *Sampson v. Hoddinott*, 1 Com. B., N. S., 590; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162; S. C., 5 Am. Rep. 526; *Hinckley*

v. *Nickerson*, 117 Mass. 214; *Blanchard v. Baker*, 8 Greenl. 253; S. C., 23 Am. Dec. 504; *Phillips v. Sherman*, 64 Me. 171; *Merritt v. Brinkerhoff*, 17 Johns. 306; S. C., 8 Am. Dec. 404; *Bullard v. Saratoga etc. Man. Co.*, 77 N. Y. 525; *Hartall v. Still*, 12 Pa. St. 248; *Mable v. Matteson*, 17 Wis. 1. In *Keeney etc. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 577, it is said that "the right of the proprietor above, to make the water useful to him by detaining it long enough to render it useful, is of the same quality as the right of the proprietor below to take the constant course of the current for his use, where both parties are applying the water to the artificial use of propelling machinery." In deciding between these conflicting rights, there are to be considered: 1. The custom of the country as to the running of mills; 2. The local custom, if there is one; 3. What general rule will best secure the entire stream to useful purposes; and 4. Whether the detention of the water is necessarily an injury to the lower mill, and whether the apparent injury is not caused by the insufficiency of its own privilege: *Id.* An upper mill-owner, in general, has no right to deprive a lower mill of the natural flow of the water longer than is necessary to raise a suitable head to run the machinery of his own mill, such machinery being reasonably adapted to the size of the stream: *Timm v. Bear*, 29 Wis. 254. But on the other hand, an upper mill-owner is not accountable to one lower down the stream, for detaining the water in his dam for several days, if this be necessary to the action of his mill, though the lower mill is thereby injured: *Whaler v. Ahl*, 29 Pa. St. 98. So a riparian proprietor has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and if the stream, in seasons of drought, becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery: *Gould v. Boston Duck Co.*, 13 Gray, 442; *Clinton v. Myers*, 46 N. Y. 511; S. C., 7 Am. Rep. 373. Proof that the wheel of an upper mill-owner drew fifty per cent more water than the natural flow of the stream would supply, that the stream was one of about uniform flow, and that such owner was in the habit of retaining the water in his pond until it would run his wheel to its full capacity, will sustain the finding of a jury that his use and detention of the water is unreasonable, as against a lower mill, which could avail itself of only a small pond: *Timm v. Bear*, 29 Wis. 254. And it is not a reasonable use of water for a riparian proprietor, who desires to use the stream for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption, so as to injure a riparian proprietor below: *Ferreira v. Knipe*, 28 Cal. 340; nor have riparian proprietors the right to collect water in a reservoir, not for the mere purpose of detaining it for a short time and afterwards restoring it, but for the purpose of supplying an adjacent town: *Directors of Swinden Waterworks Co. v. Proprietors of Wilts etc. Canal Co.*, L. R. 7 H. L. 697.

REASONABLENESS OF USE OR DETENTION, QUESTION FOR JURY.—The reasonableness of the use or detention of water, depending as it does upon the circumstances of each case, is a question for the jury: *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162; S. C., 5 Am. Rep. 526; *Evans v. Merriweather*, 3 Scam. 492; S. C., 38 Am. Dec. 106; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Phillips v. Sherman*, 64 Me. 171; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; S. C., 57 Am. Dec. 85, 90; *Thurber v. Martin*, 2 Gray, 394; S. C., 61 Am. Dec. 468, 470; *Hayes v. Waldron*, 44 N. H. 580, 584; *Holden v. Lake Company*, 53 Id. 552; *Bullard v. Saratoga etc. Mfg. Co.*, 77 N. Y.

925; *Prentiss v. Gelger*, 74 Id. 341; *Oregon Iron Co. v. Trullinger*, 3 Or. 1; *Hetrick v. Deachler*, 6 Pa. St. 32; *Hantall v. Sill*, 12 Id. 248, 249; *Miller v. Miller*, 9 Id. 74; S. C., 49 Am. Dec. 545, 547; *Snow v. Parsons*, 28 Vt. 459; S. C., 67 Am. Dec. 723; *Hawellins v. Case*, 46 Wis. 391; S. C., 32 Am. Rep. 715; *Lord Norbury v. Kitchin*, 3 Fost. & F. 292; S. C., 9 Jur., N. S., 132.

RIPARIAN PROPRIETOR HAS NO PROPERTY IN WATER ITSELF which flows by or through his land, but a simple usufruct while it passes along: *Kidd v. Laird*, 76 Am. Dec. 472, note 479, where other cases are collected.

RIPARIAN PROPRIETORS HAVE RIGHT TO FLOW OF WATER in its natural current, without any obstructions injurious to them: *Pillsbury v. Moore*, 69 Am. Dec. 91, note 93, where other cases are collected; *Dwinnel v. Veazie*, Id. 94, note 98.

WHAT IS REASONABLE USE OF WATER IS QUESTION OF FACT to be determined by the jury from the evidence: *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 246, citing the principal case. But in some cases, what is such reasonable use has been so long settled by common consent, or is so obvious in itself, that it is determinable as a matter of law: *Snow v. Parsons*, 67 Am. Dec. 723, note 727, where other cases are collected. The mode and extent to which one mill-owner may use waters of a stream, as between him and another mill-owner, is not what would be reasonable for his particular business, but what is reasonable, having reference to the rights of the other proprietors on the stream, without, by such use, materially diminishing it in quantity or corrupting the quality of it: *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 246, citing the principal case.

RIGHT OF RIPARIAN PROPRIETOR TO REASONABLY DETAIN WATER: See *Chandler v. Howland*, 66 Am. Dec. 487, note 489, where other cases are collected.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

BOYD *v.* CHESAPEAKE AND OHIO CANAL Co.

[17 MARYLAND, 195.]

WORD "PROCESS," WHEN USED IN LAW RELATIVE TO SERVICE OF WRITS, is sufficiently comprehensive to include an attachment or garnishment. **SHERIFF'S RETURN UPON WRIT OF ATTACHMENT** is evidence of the service of that writ, as in the case of other writs.

NOTICE TO TWO OFFICERS AND DIRECTORS OF CORPORATION, given them in an official capacity, is notice to the corporation, even though they fail to communicate such notice to any of the other directors.

SHERIFF'S RETURN MAY BE AMENDED, before the adjournment of the term of court at which it was made, by leave of the court.

INTERROGATORIES, FILED BY PLAINTIFF IN ATTACHMENT PROCEEDING, to be answered by a garnishee, may be waived by him and a rule of court as to the service of them is not to be enforced until the garnishee appears and the plaintiff is informed of the defense relied upon.

EQUITY WILL NOT RESTRAIN JUDGMENT BECAUSE OF IRREGULARITY in not having a writ of inquiry as provided by statute, prior to entry of judgment for condemnation by default against a corporation garnishee.

GARNISHEE CANNOT SHELTER HIS PROPERTY from execution by creditors under the protection of a mortgage given upon such property to the state. The state must assert its own rights.

APPEAL from the equity side of the circuit court. The facts are stated sufficiently in the opinion.

R. H. Alvey, for the appellant.

A. K. Syester and D. Weisel, for the appellee.

By Court, GOLDSBOROUGH, J. The record in this case shows that the appellant obtained a judgment in the circuit court for Washington county, at November term, 1855, against a certain

William Brown, for one thousand four hundred and thirty-five dollars and fifty-one cents. He subsequently caused an attachment, instead of any other execution, to be issued on this judgment, under which certain proceedings were had, so that at the March term, 1858, of said court, a judgment of condemnation was entered by default against the appellee, as garnishee in the attachment, for the whole amount of the judgment against Brown. A writ of *fiery facias* was issued on this judgment of condemnation, and levied on sundry articles of personal property claimed by the appellee. At the instance and upon the bill of complaint of the appellee, the circuit court issued an injunction prohibiting and enjoining the appellant and sheriff from making sale of the property taken in execution until the further order of the court. At November term, 1859, a motion was made by the respondent to dissolve the injunction. The court, upon the hearing, overruled the motion, and he appealed to this court.

After a careful examination of this case, and of the proceedings which were had on the common-law side of the circuit court, we think that its equity power by injunction was improperly exercised.

The bill of complaint alleges that the appellee is "a corporation chartered by the laws of Maryland." It is thus brought within the operation of the fifth section of the act of 1832, chapter 306, not only in reference to the mode of bringing the corporation into court as defendant, but, in our opinion, the word "process," used in that section, is sufficiently comprehensive to apply to the service of writs of attachments on a corporation as garnishee.

By the return of the sheriff in this case, which, by the act of 1854, chapter 75, is made "evidence of the same, as is now the case in the service of other writs," two of the officers and directors of the company were served with notice of the attachment; and their official relation to the company is nowhere denied in the bill of complaint.

In the case of *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381, the chancellor correctly lays down the doctrine, that "if notice is given to a director officially, for the purpose of being communicated to the board, although such notice should not be communicated, the institution is bound by it."

But it is objected here that the sheriff's return was wholly defective, and not binding on the appellee. This would certainly be true if confined to his first return. But his applica-

tion to the court to amend it, being made within the term, as appears by the record, it was clearly within the power of the court to allow the amendment, and the amended return made by the sheriff, gratifies the requirements of the law.

The appellee complains that the rule of court as to filing interrogatories, and the service of them, was wholly disregarded. We deem it a sufficient answer to this allegation to say that the plaintiff who files his interrogatories may waive them, and the rule of court is not enforced until the appearance of the garnishee, and the plaintiff becomes informed of the defense relied upon.

Another objection relied upon is, that the judgment of condemnation, upon which the execution issued, was by default, and that the act of 1834, chapter 305, section 4, provides for a writ of inquiry before any judgment by default can be entered against a corporation. How far this act refers to judgments of condemnation, or whether it relates only to suits instituted on original causes of action, where the amount actually due is unascertained, it is not material for us to decide. If there was irregularity in the entering of the judgment of condemnation, such irregularity will not justify the interference of a court of equity by injunction. We are fully sustained in this view by the decision of the court of appeals in the case of *Fowler v. Lee*, 10 Gill & J. 358 [32 Am. Dec. 172].

The appellee seeks to sustain its right to relief in equity by alleging that the property levied on is covered by sundry mortgages, executed by it to the state of Maryland, to secure the payment of a large indebtedness from it to the state. While we refrain from interfering with or deciding the right of the state to the property involved in this controversy, we do decide that a mortgagor cannot shelter itself or shield its property under the protection of a mortgagee. The relation existing between the appellee and the state is not that of trustee and *cestui que trust*. Whatever protection the state may be entitled to claim as mortgagee must be asserted by itself, and cannot be considered in this case, instituted by the appellee alone. There is no precedent or authority for allowing the appellee (which holds merely as mortgagor) to interpose any claim for relief on behalf of the state, as mortgagee.

Order reversed and bill dismissed; with costs.

IRREGULARITY OF ENTERING JUDGMENT against a trustee, under a garnishee process, cannot be inquired into in an equity proceeding. The trustee should make his defense against such process by a motion in the court iss-

ing the attachment: *Grooms v. Lewis*, 23 Md. 151, citing the principal case. No inquisition is necessary prior to entering such a judgment by default: *Freidenrich v. Moore*, 24 Id. 309; and *Post v. Bowen*, 35 Id. 236, citing the principal case.

NOTICE TO OFFICER OF BANK who is acting on its behalf is notice to the bank: *Smith v. S. R. Bank*, 76 Am. Dec. 179, note 188.

NOTICE OF GARNISHMENT SERVED UPON FIRM that is indebted to the execution debtor, by being delivered to one member, is notice to all the members of the firm. Such firm will not be discharged from liability to the execution creditor by reason of payment of the debt to the debtor by a partner who was ignorant of the service of the garnishment: *Arnold v. Lineweaver*, 75 Am. Dec. 757.

WHEN GARNISHED, TRUSTEE MAY, TO AVOID MULTIPLICITY OF SUITS, avail himself of the objection that the funds in his hands are trust funds, subject to the control of the court, and cannot be attached. He need not plead specially: *Cockey v. Lester*, 71 Am. Dec. 588, and note 592, 593. As to other defenses of garnishee, see also same case and note.

JUDGMENT AGAINST GARNISHEE does not affect the rights of third parties in the property found in the hands of the former: *Adams v. Filer*, 73 Am. Dec. 410. As to rights of garnishee, see note to same case 421.

TONGUE'S LESSEE v. NUTWELL.

[17 MARYLAND, 312.]

IN EJECTMENT BY ONE TENANT IN COMMON AGAINST ANOTHER, the defendant, if he intends to deny the ouster, should apply, upon affidavit, for a special rule to confess lease, entry, and not ouster. By entering into a general consent rule, he thereby admits the ouster, and cannot afterwards deny it.

IN EJECTMENT, DEFENDANT ADMITS IDENTITY OF PREMISES IN CONTROVERSY, IF HE DOES NOT TAKE DEFENSE ON WARRANT, and cannot deny the location of plaintiff's pretensions as set out in his *avowry* under the general issue.

PRINCIPLE OF ELECTION BY IMPLICATION, in equity, depends upon the circumstance that the same instrument which conveys certain property to one legatee or devisee, transfers certain other property to another legatee or devisee, and that the former beneficiary, availing himself of the instrument in one particular must not defeat its operation in another.

DEVISE VOID IN LAW is not sufficient to entitle the beneficiary to compel another devisee to make an election.

DOCTRINE OF CAVAT EMTOR applies to a purchaser where the title to the land depends upon the construction of a will, which is on record.

PERSON IS NOT ESTOPPED WHO, HAVING TITLE TO LAND depending upon the construction of a will, without any knowledge of his rights, stands by and sees another lay out money and make large investments in the property and does not give notice of his claim.

PRINCIPLE THAT ONE WHO STANDS BY AND SEES ANOTHER INVEST MONEY IN PROPERTY cannot afterwards assert any claim he may have to such property unless he discloses his own claim thereto to the person invest-

within the abutments designated in the *narr.*, the plaintiff is not entitled to recover. The opinion states other facts sufficiently.

W. H. G. Dorsey and T. S. Alexander, for the appellant.

W. M. Addison, O. Miller, and A. Randall, for the appellee.

By Court, GOLDSBOROUGH, J. This is an action of ejectment brought by the appellant against the appellee in the circuit court for Anne Arundel county.

The appellant declared for a tract of land called "Holly Hill Farm," lying in Anne Arundel county, and also in another count for an undivided moiety of the same land. He set up his pretensions in his *narr.* by metes and bounds.

The appellee came into court and prayed to be made defendant, and was required to enter into the consent rule, and confess lease, entry, and actual ouster, which he did accordingly; and declining to take defense on warrant, pleaded not guilty.

At the trial of the cause, and after the plaintiff had offered evidence to establish the lessor's title to the land in controversy, the defendant submitted the evidence contained in the first exception, to which the plaintiff objected, but the court overruled the objection, and permitted the evidence to go to the jury, with the proviso mentioned in this exception.

The defendant, then, under the ruling of the court, offered further evidence tending to prove that the lessor of the plaintiff, at the time of the sale as aforesaid, knew that she was entitled to an undivided interest in the land in controversy, and with such knowledge did assent to and acquiesce in the sale. The plaintiff excepted.

After the evidence had been given as detailed in the first exception, and the court had ruled as stated therein, the defendant, under this ruling, submitted the evidence contained in the second exception, and the plaintiff also offered his evidence mentioned in the same exception. The defendant then submitted nine prayers, all of which were rejected by the court except the sixth, eighth, and ninth, and the plaintiff offered the prayer mentioned in the second exception, which was rejected. To which ruling of the court in granting the defendant's sixth, eighth, and ninth prayers, and the rejection of the plaintiff's prayer, the plaintiff excepted. The verdict and judgment being for the defendant, the plaintiff appealed.

In the able argument of the counsel of the appellee, they

submitted four points for our consideration: 1. "That the evidence in the first bill of exceptions, to the admissibility of which the plaintiff excepted, was properly admitted, upon the ground that if believed by the jury, it estopped the plaintiff's lessor from setting up title, as a claim under such circumstances would be a fraud upon innocent purchasers;" 2. "That the evidence shows that the plaintiff's lessor elected to take under the will of Benjamin Harrison, and that having so elected, she is estopped from claiming, as heir at law of her father, a moiety of the lands described in the *narr.*;" 3. "The plaintiff's lessor being tenant in common with the defendant, and those under whom he claims, it was necessary to prove actual ouster to entitle her to bring ejectment;" 4. "That unless the land sought to be recovered is included within the abutments designated in the *narr.*, the plaintiff was not entitled to recover."

As to the third and fourth points, corresponding with the eighth and ninth prayers granted, we regard the actual ouster as conceded by the whole current of the appellee's testimony. He shows that he has been, and now is, in adverse possession of the whole one hundred and thirty-five and one half acres. That he has made valuable improvements thereon, and litigates the appellant's pretensions, upon grounds wholly foreign to the idea of the continuance of a tenancy in common. Yet, if there was any apparent force in the appellee's third point, we regard it as answered by applying the rule laid down in *Dorsey on Ejectment*, 16, and sustained by *Adams on Ejectment*, ed. 1846, 263, that "the defendant ought to have applied to the court upon affidavit, for a special rule to confess lease, entry, and not ouster; and if a tenant in common, etc., acknowledges the ouster, he will be precluded from denying, or in other words, of showing, that the plaintiff has not been injured." And the appellee, not having taken defense on warrant, thereby concedes the general identity of the premises in controversy, and cannot controvert, under his general issue, the location of the appellant's pretensions as set out in his *narr.* These prayers should, therefore, have been rejected.

The sixth prayer of the appellee should have been rejected also; we do not consider the question of election as involved in this case. The conduct of the plaintiff's lessor indicates neither an intention to defeat any provision in her father's will, nor, by taking under it, does she manifest the purpose of making her election; we cannot better express our view on this

point than by adopting the language contained in the following quotation from *White & Tudor's Lead. Cas. Eq. 65, Law Lib. 275*: "The principle of election by implication, in equity, depends upon the circumstance that the same instrument which transfers or conveys certain property of the testator's to one legatee or devisee, transfers and conveys certain other property to another legatee or devisee, and that the former beneficiary, availing himself of the instrument in one particular, must not defeat its operation in another. But if the latter devise or bequest be invalid—if the instrument in respect to it be legally inoperative and void—the former beneficiary's retaining his own property does not defeat the operation of the instrument. If it be a will, it does not defeat the intention of the testator legally declared. Retaining the subject of the transfer does not disappoint the instrument, if the law has already avoided and nullified the transfer. This occurs in the case of a devise of land by a *feme covert*, or an infant, or under a will not executed, so as to pass lands. There is, in such cases, no election from implied intention." This court decided in the former case of *Tongue v. Nutwell*, 13 Md. 415, that the provisions in the will, in relation to the property now in controversy, was void by operation of law.

But it is confidently maintained by the appellee that the lessor of the plaintiff is estopped by the knowledge of her title; and that her conduct in reference to the lands in controversy created an estoppel *in pais*. We have looked through the record in vain for the evidence to sustain this point. The appellee, and those under whom he claims, clearly come under the operation of the principle of *caveat emptor*. The same means and opportunity of tracing title were equally open to both appellant and appellee. The will of Harrison was on record, and therefore within the reach of any one who might be interested in the inspection of it. It is apparent to us that the lessor of the plaintiff, resting as she did, from the death of her father, at which time her title as heir at law accrued, until 1855, when she first received an intimation of her right, acted in total ignorance of that right, and no legal inference of knowledge can be drawn from either her acts or declarations.

It is insisted that "when one stands by and sees another laying out money and making large investments upon property to which he or she has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title." This language is

quoted from Chief Justice Shaw, in the case of *Gray v. Bartlett*, 20 Pick. 193 [32 Am. Dec. 208], where he further says: "We think this is a very just and well-settled principle when well understood and properly applied. The principle insisted on requires some qualification, and can only be held to apply against one who claims under some trust, lien, or other right not equally open and apparent to the parties, and in favor of one who would be deceived or misled by such want of notice. But where the act of one is an encroachment on the soil or rights of another, an acknowledged tort equally well known or equally open to the notice of both parties, it gives no right until it has continued for such length of time, without interruption, as to found the presumption of a grant, or give effect to the limitation of the right of action for the disturbance, as determined by the common law or by statute."

We regard this a sound illustration of an estoppel *in pais*, and are sustained in the adoption of it by this court in the case of *Casey v. Inloes*, 1 Gill, 502, where the case in 20 Pickering is quoted with approbation.

Judgment reversed, and *procedendo* awarded.

PARTY TO BE BENEFITED BY DEED may claim under it, and may, in equity, at the same time, insist on the invalidity of another deed affecting the same property: *Starr v. Dugan*, 22 Md. 70, citing the principal case.

IF MAN, SUPPOSING HE HAS ABSOLUTE TITLE to an estate, should build upon the land with the knowledge of the real owner, who suffers the erections to proceed without giving any notice of his own claim, the latter will not be permitted to avail himself of such improvements without paying a full compensation therefor, for in conscience he was bound to disclose the defects of title to the builder: *Union Hall Ass'n v. Morrison*, 39 Md. 290, citing and approving the principal case, and stating that in said case this principle had been recognized, but held inapplicable. The principal case is approved and cited to this point in *Browne v. Trustees*, 37 Id. 123, and *McLaughlin v. Barnum*, 31 Id. 455.

LEGAL POINTS DECIDED ON APPEAL GOVERN SAME CASE in all subsequent proceedings: *Nutwell v. Tongue's Lessees*, 22 Md. 455, citing the principal case and approving its doctrines.

DEFENDANT ADMITS IDENTITY OF LAND IN CONTROVERSY if he does not take defense on warrant. In ejectment, defendant cannot deny the location of plaintiff's pretensions as set out in his *warr.* under the general issue: *Newman v. Young's Lessees*, 30 Md. 419.

JOINT TENANT CANNOT MAINTAIN EJECTMENT against his co-tenant in possession, until the latter has done something which amounts to a denial of the rights of the former: *Lawton v. Adams*, 74 Am. Dec. 59.

CO-TENANT WHO HAS BEEN OUSTED may maintain ejectment: *Hutchinson v. Chase*, 63 Am. Dec. 645.

WHAT CONSTITUTES OUSTER OF CO-TENANT: *Alexander v. Kennedy*, 70 Am. Dec. 358, and note 363; *Isard v. Bodine*, 69 Id. 595, note 597; *McFarland v. Stone*, 44 Id. 325.

OUSTER IS QUESTION OF FACT, and should be submitted to the jury: *Workman v. Guthrie*, 72 Am. Dec. 654.

PARTY IS NOT ESTOPPED BY ADMISSIONS made in material points, through innocent mistake of facts, and in ignorance of his rights: *Thrall v. Lathrop*, 73 Am. Dec. 306.

ADMISSIONS AS ESTOPPELS: See note to *Thrall v. Lathrop*, 73 Am. Dec. 308; *Little v. Birdwell*, Id. 242; *Dunham v. Chatham*, Id. 228. The two latter cases relate to admissions made by accidentally putting real property in an inventory of the property of an estate by a guardian and administrator; and it was held not to be an estoppel, unless third parties would be injured by allowing the assertion of an adverse claim.

IF PARTY HAVING TITLE TO ESTATE, and knowing his title, stands by and encourages its sale, or does not forbid it, and thereby another is induced to purchase the property under a belief that the title is good, he is bound by the sale, and neither he nor his privies can dispute the validity of the purchase: *Workman v. Guthrie*, 72 Am. Dec. 654, note 663; *Saunderson v. Ballance*, 67 Id. 218, note 221.

SHAFFER v. MUMMA.

[17 MARYLAND, 381.]

AUTHORITY TO TRY AND FINE DISORDERLY AND LEWD PERSONS given to a mayor of a municipal corporation, by the charter and ordinances of such corporation, is but a police regulation, and does not contravene that provision in a state constitution, which declares the judicial power of the state to be confided to certain officers, among which the mayor of such corporations is not enumerated.

ASSUMPSIT. The facts are stated in the opinion.

D. H. Wiles and R. H. Alvey, for the appellants.

A. K. Syester, for the appellee.

By Court, LE GRAND, C. J. This is an action of trespass and false imprisonment, instituted by the wife of George Shafer, whilst a *feme sole*, against the appellee.

To the declaration, the defendant pleaded specially, in substance alleging that, at the time of the alleged trespass, he was mayor of Hagerstown, duly elected and qualified, and that the appellant, Elmira, was brought before him, and proceeded against under an ordinance of the mayor and council of Hagerstown, passed the twenty-sixth day of June, 1858, the first section of which provides that the mayor, on information, shall "cause to be brought before him all vagrant, loose, and disorderly persons, lewd women, keepers of bawdy-houses, and

persons having no visible means of livelihood, who may be found within the corporate limits of the town, and if found guilty, to fine such person not exceeding twenty dollars."

The pleas set out in full the acts of assembly and ordinances under which the defendant, as mayor of Hagerstown, justifies the trespass and imprisonment complained of.

By the fourth section of the act of 1823, chapter 155, entitled "An act to alter and change the name of Elizabethtown, in Washington county, to Hagerstown, and to incorporate the same," the moderator and commissioners of Hagerstown are authorized and empowered to provide by ordinance "for taking up, fining, or committing to the work-house in Hagerstown, all vagrant, loose, and disorderly persons, lewd women, keepers of bawdy-houses," etc.; and by the first section of the act of 1847, chapter 198, it is provided that the mayor and council of Hagerstown shall have "all the powers and immunities heretofore granted to the moderator and commissioners of said town."

A statement of facts was agreed upon between the parties. From this it appears that the plaintiffs admit that, at the time of the alleged trespass, the defendant was acting as mayor of Hagerstown, having been duly elected and qualified; that the appellant, Elmira, was brought before him, charged with being a lewd woman, found within the limits of Hagerstown, and that, after hearing of witnesses, she was adjudged by him to be such, and fined accordingly. It is also admitted, on the part of the plaintiffs, "that the said Elmira was a lewd woman and public prostitute, but well-behaved on the streets of said town, and never known to disturb any person upon said streets, or at any other place."

It thus appears that, under the statute law, the municipal authorities of Hagerstown had the right to pass the ordinance under which Elmira was arrested, etc., and also that it is an undisputed fact in the case, that at the time of the grievances complained of she was "a lewd woman and public prostitute." These concessions would seem sufficient to answer conclusively the claim of the plaintiffs, and to constitute a full and legal justification for the conduct of the defendant in the premises. But it is said, on behalf of the plaintiffs, that since the adoption of the present state constitution, the mayor of Hagerstown could not try and fine under the ordinance, because the exercise of such power is but the exertion of the judicial power, which, by the constitution, is confided to certain specified

classes of persons, and that the mayor of Hagerstown is not included in the enumeration.

This argument would be entitled to great weight if we thought the power exercised by the defendant was, in the sense of the constitution, a part of the judicial power. But we entertain no such opinion. We regard it as but a part of the police power, as contradistinguished from the regular judiciary powers of the state. From time immemorial, a distinction has been observed between the two, both in England and this country. It would be next to, if not quite, impossible for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruption—indeed, to do most of the thousand things necessary to be done to carry on its various and indispensable operations—if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictment, and trial. It has always been understood that, under the police power, persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the constitution which apportions the administration of the judicial power, strictly as such. We regard the power conferred on the corporation of Hagerstown, to summarily punish persons of the description the appellant Elmira is admitted to have been, as falling directly within the definition of a police regulation. She was punished for an offense against the decency and morals of Hagerstown, and not against those of the state; she offended within the “corporate limits,” and for such offense she was made to answer. This did not wipe out all responsibility for the offense to the dignity and sovereignty of the state.

Considering the case stated to be one which shows that under no circumstances there can be any recovery in this action, it is unnecessary to examine the prayers, for it is evident that if the facts admitted amount to a justification on the part of the defendant, any prayer which contradicts that proposition must be erroneous.

Judgment affirmed.

SELDEN v. WASHINGTON.

[17 MARYLAND, 372.]

IT IS SUFFICIENT PRESENTMENT AND DEMAND FOR PAYMENT OF NOTE, dated Washington, District of Columbia, but not on its face made payable at any particular place, when the maker did not reside or have a place of business there, or at any known place in the state, if the note is presented for payment at one of the banks in that city.

NOTICE TO INDORSER IS SUFFICIENT where a demand has been made at a bank in the place where the note was executed, for the payment of a note, because the maker has no residence or place of business there, and his residence is not known, or is out of the state, if it sets forth the date and amount of the note, and then says, "By you indorsed, and for which you are liable, has been this day protested for non-payment at the request of" the plaintiff.

NOTICE TO INDORSER, WHICH STATES that the note has been "protested for non-payment," is by necessary implication an assertion of a right by the holder, founded on his having complied with the requisitions of the law against the indorser.

THE facts are stated in the opinion.

R. I. Bowie, for the appellants.

A. Kilgour and A. B. Hagner, for the appellee.

By Court, LE GRAND, C. J. This action is brought to recover the amounts of three promissory notes; two of them drawn by John Lee, in favor of George C. Washington, the intestate of the appellee, and by him indorsed, and the other by George C. Washington, in favor of John Lee, and by the latter indorsed. In regard to this last note, the record presents no question for the decision of this court.

The points in controversy relate to the sufficiency of the demand of payment of the notes drawn by Lee, and to that of the notice of non-payment given to the indorser, Washington.

The notes were dated Washington, and not on their face made payable at any particular place; and in the case of *Sasscer v. Whitely*, 10 Md. 98 [69 Am. Dec. 126], it was held that where a note is dated at a particular place, and no other place is designated as that of negotiation and payment, the presumption is that the maker resides where the note is dated, and that he contemplates payment at that place; but this presumption may be rebutted, and if the drawer resides elsewhere within the state, when the note falls due, and this be known to the holder, demand must be made at the maker's residence or place of business. But if the drawer does not

reside in the state, and has no place of business within the state, no demand upon him is necessary: *Ricketts v. Pendleton*, 14 Md. 330, and the authorities there cited.

It was given in evidence, by a notary public of Washington, District of Columbia, that when the notes drawn by John Lee severally became due, he, at one of the banks in Washington city, made demand of payment of the note, and received for answer, "No funds here;" and that, on inquiry, he ascertained that Lee had no place of business or residence in Washington, but resided somewhere in Frederick county, Maryland. On the part of the defendant, it was shown that Lee had, for forty years, resided in Frederick county, and at one time was a representative in congress from Maryland, and at another time of his county in the state legislature.

Each of the notices of non-payment, sent to the intestate of the appellee, after setting out the date and amount of note, proceeds as follows: "By you indorsed, and for which you are liable, has been this day protested for non-payment, at the request of Selden, Withers, & Co."

There is nothing said in the notice of any demand having been made for the payment of the notes. Unless there be something in the facts of the case, this omission to inform the indorser that a demand of payment had been made would render the notice insufficient to bind the indorser: *Graham v. Sangston*, 1 Md. 59. But we think there is sufficient in the record to show that there was no demand, other than that which was made, necessary, and that, under the circumstances of the case, the notice sent was sufficient. It states that the note had been "protested for non-payment." "A statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded on his having complied with the requisitions of law against the indorser:" *Mills v. United States Bank*, 11 Wheat. 431; see *Barry v. Crowley*, 4 Gill, 202; *Hunter v. Van Bomhorst*, 1 Md. 504.

We are aware that there are decisions in some of the states in conflict with the principles recognized in the cases which we have cited, but we prefer adhering to our own adjudications as more conducive to the ends of justice, and as furnishing more reliable facilities for the transaction of commercial business.

From what we have said, it follows we are of opinion that, if the jury believed the evidence, the plaintiffs were entitled

to recover; and as a consequence of this, the granting of the defendant's prayers was error.

Judgment reversed, and *procedendo* awarded.

NOTICE OF DISHONOR OF PROMISSORY NOTE must name the maker, or it will not be sufficient to charge the indorser: *Home Ins. Co. v. Green*, 75 Am. Dec. 361. No precise form is necessary in a notice of dishonor of a promissory note, but the notice must reasonably apprise the party of the particular paper upon which he is sought to be charged: Note to above case, *Id.* 562.

OMISSION TO SERVE NOTICE OF NON-PAYMENT of a note or bill upon an indorser is excused, if the holder, after using due diligence, is unable to ascertain the address of the indorser; but he is excused only while his ignorance of the address continues: *Beale v. Parrish*, 75 Am. Dec. 414. Notice of non-payment of negotiable instrument, how and where to be made, and proof thereof: *Id.*, note 418.

INDORSER OF PROMISSORY NOTE NOT DESIGNATING PLACE OF PAYMENT is discharged by failure to give seasonable notice of non-payment, where the note was made in the state by a non-resident, and the holder's agent sent it to the maker's residence for collection, but it was returned not protested to the place where it was made, at which place it arrived two days after it was due, and was presented to the indorser, who declined to pay it, and then was again sent to the maker's residence, and was presented and protested for non-payment, and notice then given to the indorser: *Bank of Orleans v. Whittemore*, 74 Am. Dec. 605.

DEMAND OF PAYMENT OF NOTE, WHERE MUST BE MADE: *Bank of Orleans v. Whittemore*, 74 Am. Dec. 605, note 607. Demand of payment of note must be made, even though maker dies before maturity and the indorser is his administrator: *Groth v. Gyger*, 72 *Id.* 745, note 748.

PRESENTMENT, DEMAND, AND NOTICE ARE MADE WITHIN REASONABLE TIME when administrator of deceased holder of negotiable promissory note first finds it within a week after his appointment, presents it on the following day, and on the next day notifies the indorser of its non-payment: *White v. Stoddard*, 71 Am. Dec. 711, note 713.

MORRISON v. WHITESIDE.

[17 MARYLAND, 462.]

GENERAL OBJECTION TO EVIDENCE is properly overruled if any part of it is admissible.

DEMAND FOR PRODUCTION OF ORIGINAL ENTRY OR PAPER may be made at any time before the trial is concluded by the party desiring it. A refusal to produce it gives the demandant the right to prove the contents of the document by secondary evidence. If, however, the document demanded is shown to be in a place so remote from that of the trial that it cannot be produced at the trial between the time the demand is made and the conclusion of the evidence, such notice will not be deemed sufficient to authorize the introduction of secondary evidence.

PRODUCTION OF PAPERS UPON NOTICE does not make them evidence in the case, unless the party calling for them inspects them, so as to become

acquainted with their contents, in which case the rule is that they are admitted as evidence for both parties.

ON QUESTION OF AGENCY, if the testimony, though not full nor satisfactory yet tends to show the existence of the agency sought to be proved, it must go to and be passed upon by the jury.

IT IS ERROR TO INSTRUCT JURY that there was no evidence to take the case out of the statute of limitations if there is proof tending to show that a party was defendant's agent, attended to his books, and settled his accounts; that such agent had, within three years, made entries in plaintiff's books verifying the accounts sued upon.

WEIGHT AND CREDIBILITY OF EVIDENCE is for the jury. If they find against the evidence, a new trial is the proper remedy, and not appeal.

PLAINTIFF offered in evidence his ledger to prove certain accounts. Defendant objected to the admission of this book in evidence. Objection overruled. Defendant excepted. Defendant proved by James D. Morrison that from 1851 to February, 1854, he conducted for his father, the defendant, the business of blacksmith; that his agency for him was connected with this business alone, and ceased on January 1, 1855, and witness went into other business; that the said account of James D. Morrison was against witness personally, and the credit was not procured by him on defendant's credit, nor had he anything to do with it; that the note given in satisfaction of the balance due on said account was the personal note of witness; that witness did not make said note as agent of defendant; that payment of said note has never been demanded of witness. Verdict and judgment was for plaintiff, and defendant appealed.

A. S. Ridgely, for the appellant.

W. H. G. Dorsey, for the appellee.

By Court, **LE GRAND, C. J.** This suit was brought to recover a claim for work done and materials furnished by the appellee to the appellant. The action was brought on the eleventh of March, 1859. The pleas are, non-indebtedness, payment, and limitations.

The defendant served a notice on the plaintiff to produce, at the trial of the case, the books or documents containing the original entries of the account filed in the case marked as bill of particulars; also the books or documents containing his account against James D. Morrison, from July 1, 1851, to January 1, 1855, as also the books containing any other account against either James D. Morrison or the defendant subsequent to that time, informing him that secondary evidence would be given of their contents.

The plaintiff, to sustain his action, gave evidence by two persons who were in the employment of the defendant as his apprentices, the one from the year 1848 to 1853, the other from 1853 to the time of the trial, that at different times between 1851 and 1855, they had known the Morrisons, the defendant and his son, James D. Morrison, to order and obtain work, such as boots, shoes, etc., from the shop of the plaintiff, and that during the same time minor children and employees of the defendant had work also done in the shop of the plaintiff. It was also given in evidence, by a witness named Gorsom, that about seven years prior to the trial, he, being in the employ of the defendant, wishing to procure a pair of boots, applied to the defendant for the money to enable him to purchase them, whereupon the defendant told him to go to his son James, who attended to his business; that he did so, and received from James an order on the plaintiff for the boots, upon which order he procured them.

After this testimony, the plaintiff offered in evidence his ledger. This book contained several accounts, some against the defendant and some against other persons. To the admissibility of this evidence the defendant's counsel objected, but the court overruled the objection, and allowed the book with the accounts and entries, as set out in the record, to be given in evidence, whereupon the defendant excepted. This constitutes the defendant's first exception.

The objection to the admissibility of the evidence being general, if any part of it was admissible, the court properly overruled the objection: *Budd v. Brooke*, 3 Gill, 220 [43 Am. Dec. 321].

The rules of Howard county circuit court are not set out in the record, and we are therefore compelled to look to the general doctrine as to the time within which notice to produce an original paper must be given, and the effect of the production on the respective parties to the suit.

The general rule is, that the party desiring the production of an original entry or paper has the right to demand it at any time before the trial is concluded, and the refusal to present the one or the other gives to the demandant the right to offer secondary evidence of the contents. This rule is subject to the exception, that if the paper be shown to be in a place so remote from that of the trial that it cannot be produced at the trial between the time when the notice is given and the conclusion of the evidence, such notice will not be deemed suffi-

cient to authorize the party giving the notice to offer secondary evidence of its contents. The giving of the notice does not, however, make the paper called for evidence; to make it so, something more is necessary. In section 563 of his work on evidence, Mr. Greenleaf states the doctrine as follows: "The production of papers, upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case the English rule is, that they are admitted as evidence for both parties." There is no evidence in this exception that the defendant, or his counsel, inspected the ledger, and therefore the book, if admissible at all in evidence, is so, as was urged on behalf of the appellee, on the ground that it contained entries verified by the agent of the defendant. If it be conceded that the testimony of the witness Gorsom, on the question of agency, is not very full and satisfactory, yet it is evidence tending to show the existence of an agency, and should have been passed upon by the jury. We are of opinion the court did not err in allowing the entries to be given in evidence, and accordingly affirm its ruling in this exception.

In addition to the evidence contained in the first bill of exceptions, the plaintiff offered evidence by the witness Gorsom, that within the last year or two he had heard the defendant say that his sons James and Richard attended to his books, and settled his accounts. On this state of case, the defendant asked the court to instruct the jury that there was no evidence in the case to take it out of the statute of limitations. We do not see how this direction could have been given, in view of the testimony of Gorsom as to the agency, and the several entries at the foot of the different accounts, made by James D. Morrison.

The evidence subsequently offered by the defendant, if believed by the jury, certainly was very clear and distinct, and should have concluded the case in his favor. But with this we have nothing to do; it is for the jury alone to weigh and decide upon the credibility of the evidence. Besides, the court, in granting the defendant's second, third, fourth, fifth, and sixth prayers, gave him the advantage of his evidence before the jury. If the jury found against the evidence, a new trial was the remedy, and not an appeal to this court.

Judgment affirmed.

UPON GENERAL OBJECTION TO TESTIMONY, if it is admissible for any purpose, the objection should be overruled: *Everett v. Neff*, 28 Md. 185, citing the principal case.

GENERAL OBJECTIONS TO EVIDENCE ARE NOT GOOD. The specific defect must be pointed out to the court: *Rindschoff v. Malone*, 74 Am. Dec. 367, note 368.

SECONDARY EVIDENCE, WHEN ADMISSIBLE: *People v. Lambert*, 72 Am. Dec. 49, note 57; *Tobin v. Shaw*, 71 Id. 547.

ALTHOUGH EVIDENCE IS NOT FULL AND SATISFACTORY upon any fact, it should nevertheless be submitted to the jury, as they are the exclusive judges of the facts: *Nat. Mech. Bank v. Nat. Bank*, 36 Md. 23, citing the principal case.

DECLARATIONS OF AGENT, made while acting within the scope of his authority, will bind his principal, but it must clearly appear that he was agent, and was acting within the scope of his authority at the time the declarations were made: *Roseland v. Long*, 45 Md. 444, citing the principal case.

KNOWLEDGE OF AGENT, IN COURSE OF AGENCY, is knowledge of principal: *Hunter v. Watson*, 73 Am. Dec. 543, note 549.

COURT MAY PROPERLY DECLINE to call especial attention of jury to particular part of evidence, by instructions as to the weight to which it is entitled or the purposes for which they may consider it: *Castro v. Illies*, 73 Am. Dec. 277; *Wood v. Chambers*, 70 Id. 382.

INSTRUCTIONS ASSUMING FACT WHICH SHOULD BE LEFT TO DETERMINATION OF JURY IS ERRONEOUS: *Tyner v. Stoops*, 73 Am. Dec. 341, note 348.

SMITH v. WILSON.

[17 MARYLAND, 490.]

GRANTING LETTERS OF ADMINISTRATION CANNOT BE PRESUMED.

SECONDARY EVIDENCE OF JUDICIAL RECORD cannot be received until the original is shown to have existed, and to be now lost, mutilated, or destroyed, or otherwise incapable of being produced.

ADMINISTRATION MUST BE HAD upon an estate of a decedent in order to derive title to his personal effects.

REFLEVIN. Verdict and judgment for plaintiff, the appellee here. The other facts are stated in the opinion.

A. Randall, for the appellant.

O. Miller and A. B. Hagner, for the appellee.

By Court, LE GRAND, C. J. This case has been heretofore before this court, on the same state of pleadings and evidence as shown by the present record: See *Wilson v. Smith*, 10 Md. 67.

In the rulings of the court below, we discover nothing of which the appellant can justly complain; on the contrary, we think the court allowed her more than she was entitled to, by granting her first prayer, which authorized the jury to presume the grant of letters of administration. The fact of ad-

ministration on the estate of Samuel Owens is indispensable to the defense of the appellant; and we are not aware of a single case, nor has any been referred to by counsel, in which the grant of letters has been allowed to be presumed from the lapse of time. The granting of letters of administration by the orphans' court is a judicial act, and like all such acts, must be proved by the record. The rule on this subject is very clearly stated by the supreme court of the United States, in the case of *Weatherhead v. Baskerville*, 11 How. 360. In that case, the effort was to allow the jury to infer a partition of lands from the evidence, without the production of the record showing the partition. What was said there is equally applicable to the attempt made in the present instance. "By the law of Tennessee," said the court, "such a partition is a judicial act, and becomes a record. It can only be proved as such records may be; and when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain and fixed kind, well known in the law. In the proper sense of the term "presumed," the records of courts are never so. The existence of an ancient record of another kind may sometimes be established by presumptive evidence. But that is not done without very probable proof that it once existed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is, that before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record; that it has been lost or destroyed, or is otherwise incapable of being produced; or that its mutilation from time or accident has made it illegible. In this last, though not without the production of the original in the condition in which it may be. The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence."

In the case now before the court, there is no pretense that the record has been lost or mutilated; and the proof shows that the records of the orphans' court of Calvert county contain no allusion whatever to the fact of letters having been granted on the estate of Samuel Owens. This is a possessory

action, and depends entirely upon the title, which can only be transmitted through the instrumentality of letters of administration. It is not an action in which the equitable considerations urged by counsel, if they be shown to exist in point of fact, can avail to the defendant; they can be invoked, if at all, only in another tribunal.

Entertaining these views of the case, it follows that the court did not err to the injury of defendant in its action on the prayers, and the judgment must therefore be affirmed.

Judgment affirmed.

SECONDARY EVIDENCE WHEN ADMISSIBLE: See note to *Morrison v. Whiteside*, ante, p. 661.

LOST OR DESTROYED RECORD MAY BE PROVED BY SECONDARY EVIDENCE: *Hubbs v. Vance*, 48 Am. Dec. 770, and note.

LOVEJOY v. IRELAN.

[17 MARYLAND, 525.]

ONE DEFENDANT CANNOT APPEAL ALONE FROM JOINT DECREE AGAINST SEVERAL, and his appeal if so taken will be dismissed.

GRANTOR OF DEED, FRAUDULENT AS TO CREDITORS, is a necessary party in a suit to vacate such deed.

BILL filed by appellee against appellant and one Heath to vacate and set aside a deed from said Heath to Lovejoy as fraudulent as to creditors of grantor. A decree was entered against both defendants vacating the bill of sale. Lovejoy alone appealed, and appellee moved to dismiss the appeal.

H. Stockbridge, for the appellant.

B. C. Barroll, for the appellee.

By Court, TUCK, J. Upon the pleadings and proofs in this cause, a decree was passed vacating a deed from Heath to Lovejoy, on the ground of fraud, as against the creditors of the grantor, and giving costs against both defendants. Lovejoy only has appealed, and the appellee having moved to dismiss the appeal on account of the non-joinder of the other defendant, our duty is to inquire whether the appeal lies.

It has always been the practice in this state to make the grantor a defendant to bills of this kind, and we consider the law to be well settled that he is a necessary party, as well on account of the fraud charged (*Calvert on Parties*, 19, 20, 24, 264), as because of the title remaining in him for the benefit

of creditors: *Waters v. Dashiell*, 1 Md. 470. This being so, the decree in this case must be treated as joint against both defendants, not only as to costs, but also as to the relief granted.

We have not been referred to any case in Maryland where the point under consideration has been decided, but there is no doubt that in cases at common law a writ of error brought by one of several defendants could not be maintained: *Tidd's Pr.* 1189, 1226. The same has been held in this country: *Duvall v. Cox*, 5 How. (Miss.) 12; *Green v. Planters' Bank*, 3 Id. 43; *Young v. Ditto*, 2 J. J. Marsh. 72. The question has been before the supreme court of the United States several times, and uniformly disposed of by disallowing the appeal, without reference to the character of the case, whether at law or in equity. In *Owings v. Kincannon*, 7 Pet. 399, a case in equity, Chief Justice Marshall, delivering the opinion of the court, said: "Upon principle, it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal." He also adverted to the general usage of chancery to make one final decree, binding on all parties united in interest: See also *Deneale v. Stump*, 8 Pet. 526. These cases were afterwards (*Wilson v. Life and Fire Ins. Co. of N. Y.*, 12 Id. 140) referred to by Chief Justice Taney, and the same principle applied.

The considerations on which this practice is followed elsewhere apply in our courts, and ought to have the same effect. Inconvenience may sometimes result to parties in the particular instance, but general rules framed to protect the rights of suitors, and to promote regularity of judicial proceedings, should not be dispensed with to meet the exigencies of special cases. The law indicates a mode, by summons and severance, for one party to compel his co-defendant to join in the appeal, or place himself in a position to proceed in his own behalf: *Tidd's Pr.* 1189.

It is proper to observe that a similar point was ruled at this term against the motion to dismiss in the case of *Easter v. Travers* [not reported], but on the ground that the order appealed from was not joint as against the parties; the court expressly stating that in a proper case such a motion might prevail.

Without expressing any opinion as to the merits of the case, we think the appeal should be dismissed, with costs.

Appeal dismissed.

APPEAL BY ONE OF SEVERAL JOINT DEFENDANTS, against whom a judgment has been rendered, must be dismissed. The law points out a remedy by summons and severance, in case any defendant refuses to appeal: *Motts v. Primrose*, 23 Md. 492, 493; *C. C. & I. Co. v. Jeffries*, 27 Id. 535, both citing the principal case. The law on the above point has been changed by statute, and now one defendant may appeal alone: *Hall v. Jack*, 32 Id. 263, and *Cox v. Jack*, Id., citing the principal case. The doctrine announced as above by the principal case is disapproved, and the case cited in *C. C. & I. Co. v. Jeffries*, 21 Id. 381.

ALL PERSONS WHO PARTICIPATE IN FRAUD in obtaining a judgment, are necessary and proper parties defendant in an action to annul such judgment: *Hill v. Reifsnider*, 39 Md. 433. The same principle is laid down in *Walker v. Rich*, 38 Id. 220, both citing the principal case. The principal case is cited and distinguished, as to this point, in *Bouldin v. Bank*, 21 Id. 48.

O'NEAL v. VIRGINIA AND MARYLAND BRIDGE CO.

[18 MARYLAND, 1.]

FOR PURPOSES OF TAXATION, a bridge over the Potomac river, and other property lying within the state of Maryland, belonging to a bridge corporation which does business in Virginia, is assessable in the county in which it is situated under a Maryland law, which provides that the property of a corporation having no place of business in the state shall be assessed for taxation in the county where such property is situated.

RELIEF IN EQUITY FROM ASSESSMENT.—An assessment was made and entered on the assessor's books against the "Potomac Bridge Company," when the true corporate name was "The Virginia and Maryland Bridge Company at Shepherdstown," and the company knew of the assessment, and did not appear before the board of commissioners, which had authority to determine complaints, etc., of persons aggrieved by the valuation of the assessor, to have such error corrected, or for any purpose; it was held that a court of equity could not interfere in behalf of such corporation to relieve it from the payment of the tax assessed.

TAXES ARE LAID FOR SUPPORT OF GOVERNMENT, and all property made liable to contribute to this end ought to be embraced in assessments for that purpose.

ASSESSMENTS FOR TAXES ought not to be vacated, and property released from taxation, because public officers have not strictly followed the statutes, which are merely directory. A substantial compliance with the statutory directions is sufficient.

PROPERTY OWNERS MUST SEEK RELIEF against the improper exercise of the power of taxation in the manner pointed out by statute. If he fails to do so, he must present a very strong case to get relief in equity, if indeed he can be relieved at all.

ALL PERSONS MUST TAKE NOTICE of the law. When the law requires notice to be published, and it is published as the law directs, all persons will be held to have received the notice, whether they actually did or not.

WHERE THERE IS REMEDY PROVIDED BY LAW, courts of equity cannot give relief.

APPEAL in equity from an order making perpetual an injunction granted on a bill filed by the corporation appellee against appellants, who compose the board of county commissioners of Washington county, and also the tax collector of said county, restraining them from selling certain property of said corporation for delinquent state and county taxes. The other facts are sufficiently stated in the opinion.

A. K. Syester and R. H. Alvey, for the appellants.

D. Weisel, and J. R. Tucker, attorney-general of Virginia, for the appellee.

By Court, TUCK, J. The admissions of fact to be found in the agreement, on which this case was tried, render it unnecessary to examine the points that were so fully argued at the bar, touching the interstate rights of Maryland and Virginia. It is admitted that the property on which this tax was assessed lies within the limits of Washington county, in this state; this brings it under the operation of the seventeenth section of the act of 1852, chapter 337, which provides that where the office of a turnpike, railroad, canal, or other improvement corporation is not within the state, "the assessable property of such corporation shall be valued and assessed in the county in which it is situated." We agree, in opinion, with the judge below, that this bridge property was a proper subject of taxation under that act. It is plain, upon the words of the act, and need not be amplified: *Howell's Case*, 3 Gill, 14; *Providence Bank v. Billings*, 4 Pet. 563.

The questions relating to the manner of making the assessment, and the proceedings of the commissioners of Washington county, are more difficult of solution; but upon the best consideration we have been able to bestow upon them, we have reached the conclusion that the views of the learned judge cannot be sustained.

Taxes are laid for the support of government, and all property made liable for contribution to this object by the constitution and laws ought to be embraced in assessments for that purpose. It is not only the duty of the legislature to reach all descriptions of property for the sake of justice to all the citizens, but the interests of the state require it. To this end the tax laws have made provision for the correction of errors on the part of the assessors, by appeal to designated tribunals; so that if they perform their duty, excessive valuations are not likely to occur; nor will any persons escape whose

property is liable to be taxed. But assessments ought not to be vacated, and the particular property released altogether, because the public officers have not strictly followed the provisions of law, which are merely directory. It is not said anywhere that the assessment shall be invalid if such directions are not complied with. For example, suppose the commissioners neglect to have lists prepared and deposited in the clerk's office, or the clerk were to omit his duty in that behalf, as required by the twenty-fifth section of the act of 1852, chapter 337, would the whole assessment be inoperative, and all the property of such county discharged from its contribution to the public expenses? In the case of *Young v. State*, 7 Gill & J. 253, where a sheriff's bond had not been executed according to law, it was held that the parties were liable; that the formalities were required for the public security, and not for the benefit of the obligors. It was also said "substance, and not form, is to control the construction of legislative enactments, prescribing a mode in which acts are to be done." Where provision is made for the relief of property owners against the improper exercise of the taxing power, the law expects those concerned to be diligent in protecting their interests; and if they omit the opportunity, they cannot be relieved in equity, if at all, unless a strong case is presented, showing, among other things, that they have not been altogether in default in availing of the means provided by the tax laws. And there must be something more than legal error assigned: it must present facts appealing to the conscience of the court, to prevent wrong and injustice: *Methodist Prot. Church v. Mayor etc. of Baltimore*, 6 Gill, 391 [48 Am. Dec. 540]; *Gott v. Carr*, 6 Gill & J. 312.

It is not averred here that the assessment was excessive, or that it was made without notice to the owners, and that they had no knowledge, until after the time for appealing to the commissioners had expired, even conceding that these averments would have entitled the company to relief. The ground of the equity is, that the property is not taxable at all, and that the assessment had not been made and returned according to the law. If the objection as to the manner of making and returning the assessment is merely technical, and goes to matters of form, and not to substance, this court ought not to interfere. It is not pretended that the bridge property of the company was not assessed. The case shows that if they pay this tax they will pay on their own property, and on none

other. The answer shows that they had knowledge of the assessment; and no reason is assigned for their not going before the commissioners to have the supposed errors corrected. The entries in the books sufficiently identify the property. The complaint is, that their property is entered in the name of the "Potomac Bridge Company," which is not their corporate title, and the proceeding was commenced, not to correct the error by having the proper name inserted on the books, and thereby charge the real owner, but to avoid payment altogether. We have no power to make the correction, for the benefit of the public, which the commissioners might have done; and if courts of equity were to interfere in such cases, parties taxed, instead of going before the proper tribunal to have errors corrected, and thereby, whilst protecting themselves, secure to the state or county their just demands against the property, would wait until the time had elapsed, and then, by proceeding in equity, escape altogether: *Methodist Prot. Church v. Mayor etc. of Baltimore*, 6 Gill, 391 [48 Am. Dec. 540].

Much stress was laid on the twenty-fifth section of the act, as showing that some important privilege was designed to be conferred on property owners, and that this property had not been properly set out in the lists placed in the clerk's office. It will be observed that the lists are required to be made out in March, after the assessments are corrected in January, in which month the commissioners are required to meet. Hence it is clear that the supposed error in this list did not injure the company, nor so mislead their officers as to the property and the owner, thereby preventing their application to the board of commissioners in proper time. All persons must take notice of the law. The act of assembly requires public notice to be given of the meetings of the commissioners. The act and the publication impute notice to all persons, whether they have actual information or not. The twenty-sixth section of the act authorized the commissioners to increase or abate valuation, and to exclude property which had been improperly valued. It is well settled that, where such remedy is afforded, a court of equity has no jurisdiction to make corrections: *Methodist Protestant Church v. Mayor etc. of Baltimore*, 6 Gill, 391 [48 Am. Dec. 540].

For these reasons, the decree must be reversed, and the bill dismissed.

Decree reversed, and bill dismissed.

ONE WHO HAS ALIENATED PROPERTY, but permits it to be subsequently assessed to him, becomes thereby liable to pay the tax. He must apply to the county commissioners at the proper time to have the error corrected: *County Commissioners v. Olagett*, 31 Md. 213; and *Stoddert v. Ward*, Id. 565, both citing the principal case.

TAX IN CALIFORNIA IS PERSONAL OBLIGATION in the nature of a debt due from the owner of property taxed to the state, and is not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute: *People v. Seymour*, 76 Am. Dec. 521.

MISTAKE IN NAME OF PERSON TAXED: See note to *People v. Seymour*, 76 Am. Dec. 535.

FAILURE TO RETURN ASSESSMENT ROLL at time prescribed by law: *People v. Seymour*, 76 Am. Dec. 521. For a general discussion of taxation, and collection of authorities on the subject, see Id., note 527-537.

MUTUAL FIRE INSURANCE CO. v. DEALER.

[15 MARYLAND, 26.]

IMPLIED OR RESULTING TRUSTS arise where a purchase is made by one person in the name of another. Such trusts arise by operation of law, are not within the statute of frauds, and may be proved by parol.

NO EQUITABLE PRESUMPTION OF TRUST ARISES where the grantee of property is related to the person from whom the consideration proceeds, in such a manner that the latter is under a moral or natural obligation to provide for the former, but *prima facie* the transaction will be regarded as an advancement for the benefit of the nominee. This may be rebutted by evidence clearly showing that a trust was intended to be created in favor of the person who paid the purchase price.

EVIDENCE USED TO ESTABLISH RESULTING TRUST must be of facts and statements of the parties, which happened or were made contemporaneously with the purchase. An exception to this rule is that the declarations of the trustee may be received in evidence, if made at any time, to establish such a trust.

MARRIED WOMAN MAY BECOME SEIZED OF LAND BY DIRECT GIFT OR PURCHASE in her own name and as her own property in Maryland, but in such property her husband retains his marital rights, viz., a life estate, in right of his wife, with a right to the perannuity of the products and profits of the land during coverture, and a right to the land by curtesy in the event of his surviving his wife.

HUSBAND HAS INSURABLE INTEREST in his wife's property under the laws of Maryland.

INSURANCE MADE BY INSURANCE COMPANY at its own risk, on a husband's interest in his wife's property, in Maryland, would be covered by describing the property as his; and his omission to state the nature and extent of his interest, where no inquiry was made, would not avoid the policy.

IN INSURANCE MADE BY MUTUAL INSURANCE COMPANY, the title of the assured to the property insured becomes an important consideration of the contract, when that instrument declares that the premium notes shall be a lien upon the real property insured, and a material misrepresentation or concealment in relation to it will avoid the policy.

ASSURED WHO DESCRIBES INSURED PROPERTY as "my house" does not thereby warrant his title to the realty to be an unincumbered fee-simple title.

WHETHER MISREPRESENTATION OR CONCEALMENT will avoid the policy depends upon its materiality to the risk undertaken; and the policy would attach, unless the insurer had been induced to make it by reason of such concealment or misrepresentation of material facts with respect to the title, which, if known to the company, would have influenced it in making the contract.

QUESTION OF MATERIALITY OF MISREPRESENTATION OR CONCEALMENT of facts is a question for the jury to decide.

INSURANCE COMPANY IS NOT BOUND BY STATE OF RECORDS CONCERNING TITLE to the property insured, but may rely upon the representations of the assured with reference thereto.

PARTY DEFENDING AGAINST OBLIGATION ON ACCOUNT OF MISREPRESENTATIONS, ETC., is entitled to specific instructions to the jury directing their attention to the particular fact in which the alleged misrepresentations, etc., consist.

IF INSURANCE AGENT FILLS UP APPLICATION of an applicant for insurance to the company for which the agent is soliciting insurance, and is also a stockholder in such company, the agent becomes thereby the agent of the person seeking to be insured, for that purpose, and is a competent witness on behalf of the company to prove what happened between the agent and applicant at that time.

ASSUMPSIT IS PROPER REMEDY on a contract, not under seal, indorsed on a policy of insurance for additional insurance.

THE facts are sufficiently stated in the opinion.

I. N. Steele and W. Schley, for the appellants.

F. H. Stockett and T. S. Alexander, for the appellee.

By Court, BARTOL, J. The defense to this action, relied upon by the appellant, rests upon the alleged misrepresentation or concealment by the appellee, when the contract of insurance was made, of the true nature and character of his title or interest in the property insured.

In the application for insurance, the appellee described the property as "his property," whereas the evidence discloses that the whole fee-simple title was vested in his wife, Janeatta S. Deale, by a deed of conveyance, dated the eighteenth day of July, 1850, and that it so remained at the time the insurance was effected. For the purpose of establishing that the beneficial title was in the appellee, in the nature of a resulting trust, the evidence of George W. Jones and of Alexander Randall was offered, and permitted to go to the jury; this evidence is contained in the appellant's first and second bills of exceptions, which, as they present the same questions, may be considered together.

Implied or resulting trusts arise where a purchase is made by one person in the name of another. In *Hill on Trustees*, 91, the doctrine is thus succinctly stated: "Where, upon a purchase of property, the conveyance of the legal estate, taken in the name of one person, while the consideration is given or paid by another, the parties being strangers (in blood) to each other, a resulting or presumptive trust immediately arises by virtue of the transaction; and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." Such trusts arise by operation of law, are not within the statute of frauds, and may be proved by parol: *Id.* 96. "If the person in whose name the conveyance of property is taken be one for whom the party paying the purchase-money is under a natural or moral obligation to provide, no equitable presumption of trust arises from fact of the payment of the money, but on the contrary, the transaction will be regarded, *prima facie*, as an advancement for the benefit of the nominee. In that case, therefore, it will be for the party who seeks to establish a trust on behalf of the payor of the purchase-money to displace, by sufficient evidence, the presumption that exists in favor of the legal title:" *Id.* 97. In 2 *Story's Eq. Jur.*, sec. 1202, it is said: "If a parent should purchase in the name of a son, the purchase would be deemed, *prima facie*, as intended as an advancement, so as to rebut the presumption of a resulting trust for the parent. But this presumption, that it is an advancement, may be rebutted by evidence manifesting a clear intention that the son shall take as trustee." In section 1203, the same author says: "This presumption in favor of the child, being thus founded in natural affection and moral obligation, ought not to be frittered away by nice refinements. It is, perhaps, rather to be lamented that it has been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature." And in section 1204: "The like presumption exists in the case of a purchase of a husband in the name of his wife. Indeed, the presumption is stronger in the case of a wife than of a child; for she cannot, at law, be the trustee of her husband." See *Hill on Trustees*, 98, 101, 103, and authorities there cited.

Having thus stated the principles upon which the doctrine of a resulting trust depends, we proceed to consider the evidence offered in this case for the purpose of rebutting the presumption of law in favor of Mrs. Deale's title, and of establishing a resulting trust in favor of the appellee. In con-

sidering this evidence, we must throw out of view the testimony of Mr. Randall of the declarations made to him by Mr. Deale in 1854, four years after the deed; and also the conversation between Jones, the witness, and Mr. Deale, in 1852, which was two years after the deed was made to Mrs. Deale. These declarations were clearly inadmissible, for the purpose of affecting the title conveyed to Mrs. Deale by the deed of June, 1850. In *Hill on Trustees*, 105, it is said: "Any evidence, however, which is used for the purpose of displacing the title of the nominee, unless it is founded on his own admission or declaration of trust, must be contemporaneous with the purchase. . . . Subsequent acts or declarations of the purchaser, or any other matter arising *ex post facto*, cannot be admitted for the purpose; although they be of the most unequivocal and conclusive description." Discarding the subsequent declarations of Mr. Deale, made to Jones and Randall, then nothing remains except the contract of the twenty-eighth day of January, 1850, made in California between Waters and Deale, and the fact that the purchase-money was paid by Deale. This contract was abandoned, and a new contract afterwards made with Waters by Jones, for the purchase of the land at a different price; and in fulfillment of this last contract, the deed of conveyance was made to Mrs. Deale by the direction of Jones, who, as he testifies, had the authority of Mr. Deale for so doing. The simple fact that the appellee paid the purchase-money, as we have already seen under the authorities cited, could not in this case raise any presumption of a resulting trust in the appellee. In the opinion of this court, the evidence we have been considering, offered for that purpose, was insufficient in law, and ought not to have been allowed to go to the jury. It follows from what we have said that the circuit court erred in its ruling upon the appellant's first and second exceptions; and for the same reasons, the first prayer of the appellee was erroneously granted.

Having disposed of the appellee's claim, so far as it rested upon a supposed resulting trust, the case stands simply upon the title under the deed of the eighteenth of July, 1850. By the act of 1842, chapter 293, section 1, any married woman was enabled to become "seised of land by direct gift of purchase in her own name and as of her own property." Under the deed, therefore, to Mrs. Deale, she was vested with the estate in fee; not, however, to her sole and separate use. In construing the act of 1842, this court has said that, in such

property, the husband retained his marital rights: *Schindel v. Schindel*, 12 Md. 108, 121; S. C., Id. 294, 312. In this case, the appellee's rights were to a life estate, in right of his wife, with a right to the pernaney of the product and profits of the land during the coverture—and a contingent curtesy right in the event of his surviving his wife: See *Wright v. Wright*, 2 Id. 453, 454 [56 Am. Dec. 723]. The question, then, presented for our decision is, whether such an interest in the property is sufficient to entitle the appellee to recover, upon the contract of insurance sued on in this case? Beyond all question, the appellee had an insurable interest: *Franklin F. I. Co. v. Coates*, 14 Id. 297; Angell on Fire and Life Insurance, sec. 44; *Franklin Ins. Co. v. Drake*, 2 B. Mon. 50. The defense here is, that the appellee did not truly represent his title to the company. If this were an ordinary contract of insurance, made by a company insuring at its own risk, such an interest as the appellee's would be covered by an insurance of the property as his; and his omission to state the nature and extent of his interest, where no inquiry has been made on the subject, would not avoid the policy: See *Franklin F. I. Co. v. Coates*, 14 Md. 298; Angell on Fire and Life Insurance, c. 8, secs. 182–186, and note 9; 1 Smith's Lead. Cas. 633, 638, and cases there cited. But this contract was made with a mutual insurance company, and is obviously governed by very different principles and rules of construction. The contract of insurance constituted the appellee a member of the association, and bound him by its charter, constitution, and by-laws; his assent to them was expressed in his application; they were incorporated in the policy, and became a material part of the contract.

By the fourth section of the charter (act of 1849, c. 213, sec. 4), all premium notes are declared to be liens on the real estate insured, which is held liable for the payment of the same, to meet losses that may be incurred by the company. In such case, the title of the insured becomes a most important consideration of the contract, and a material misrepresentation or concealment in regard to it will render the contract void. We do not entertain the opinion that this company might not, under its charter, insure such an interest as the appellee held in the property of his wife. On this question we think the case of *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111, is strictly applicable. In this respect, the two charters are identical. This company has "full power and authority to make insurance on

any kind of property:" Act of 1849, c. 213, sec. 1. "This language," the court said, in *Allen v. Mutual F. I. Co.*, 2 Md. 118, "is abundantly comprehensive to include both real and personal estate, and all such interests in either, as the well-settled principles of law recognize to be insurable interests;" and again, on page 123: "This company have the authority to insure whatever interests are insurable, in ordinary fire insurance companies." To that extent, the decision in *Allen v. Mutual F. I. Co.*, *supra*, governs this, and adhering to what was then decided, we are of opinion that the appellee had an insurable interest, which this company had the power to insure under its charter. We come now to consider the terms and conditions of the particular contract sued on, and also the effect of the representation by the appellee as to title. These questions did not arise in Allen's case; there was nothing in it to show any representation whatever as to title; or that the company was not fully informed of the nature and extent of the interest of the assured: See *Allen v. Mutual F. I. Co.*, Id. 124. Here, however, we have before us the written application for insurance, in which the appellee calls the property "his property." This application is referred to in the policy, and upon it the company acted in making the contract, without any notice of the title of Mrs. Deale or of the limited nature of the appellee's interest.

We do not adopt the view contended for by the appellant, that the application for insurance, and the reference thereto in the policy, constituted a warranty, on the part of Deale, that he held the fee-simple title to the property unincumbered, the breach of which, by the existence of the legal title in Mrs. Deale, would render the contract void. Nor is there any express provision in the charter, constitution, or by-laws, that in terms declares a policy to be void where the title of the assured is not truly stated, or is of a limited nature, less than the fee, or incumbered. In this last respect, this case differs from those of *Addison v. Kentucky and L. Ins. Co.*, 7 B. Mon. 470; *Leathers v. Farmers' Mut. F. I. Co.*, 24 N. H. 259; *Marshall v. Columbian M. F. I. Co.*, 27 Id. 157; and other cases of the same class, many of which have been cited in argument.

In our opinion, the representation made by the appellee as to title was not, as we have before stated, a part of the contract, in the nature of a warranty, that he held the whole fee-simple title unincumbered, the breach of which would render the policy void. The whole defense, therefore, rests upon the

alleged misrepresentation or concealment of the true nature and extent of his interest, and of the title of Mrs. Deale. Whether such alleged misrepresentation or concealment will avoid the policy, depends upon its materiality to the risk undertaken, and in our opinion, the question of materiality is a question of fact to be submitted to the jury: 2 Duer on Insurance, 689, sec. 31; *Franklin F. I. Co. v. Coates*, 14 Md. 299. There is some conflict of authority on this question, but the ordinary rule is as we have stated; and we cannot, in this respect, distinguish this case from those in which that rule has been established and recognized. Having said that the appellee had an insurable interest, which this company had power to insure under its charter, the policy would attach, unless the company had been induced to make it by reason of some misrepresentation or concealment of material facts with regard to the title, which, if they had been truly known by the company, would probably have influenced it in making the contract or estimating the risk. In the case of a mutual insurance company, where a lien is created on the property insured, a misrepresentation or concealment as to title may be material to the risk, which would not be so in an ordinary case. But its materiality is a question for the jury, and the court cannot assume it as matter of law.

Having thus stated the opinion of this court upon the several questions involved in this case, we proceed to pass upon the several prayers presented in the last bill of exceptions.

The first prayer of the plaintiff, as has been already said, was erroneously granted, it is based upon a supposed title in the appellee, in the nature of a resulting trust, of which there was no evidence sufficient, in law, to go to the jury.

The plaintiff's second prayer was properly granted; it asserts, simply, that the title of Deale to the property, in right of his wife, was an insurable interest, sufficient to sustain the contract or policy, and taken in connection with the defendant's eleventh prayer, which was granted by consent, is free from objection.

The third prayer of the plaintiff was properly rejected; the company was not chargeable with notice of the state of the title disclosed by the land records.

For the reasons already stated in this opinion, we affirm the ruling of the circuit court upon the defendant's first, second, third, and fourth prayers. We also affirm its action in granting the defendant's fifth, seventh, eighth, and ninth prayers.

We think the defendant was entitled to the instruction asked for in the sixth prayer. We should not, however, reverse the judgment on account of its refusal, as the defendant had the benefit of the same instruction, in effect, by the granting of the ninth prayer. Still, as the case must be sent back, we deem it proper to say that the defendant was entitled to ask for a specific instruction, directing the attention of the jury to the particular fact in which the alleged misrepresentation or concealment consisted.

The only remaining question presented by the exceptions involves the competency of the witness Garman; on this question we affirm the decision below. In the matter of filling up the application, and presenting it to the company, the witness was the agent of the appellee, and as such a competent witness.

Judgment reversed, and *procedendo* ordered.

DEED DESIGNED TO MAKE PROVISION FOR WIFE, whether considered a voluntary conveyance without consideration, or one based upon a valuable consideration, her rights are not to be destroyed by construction in a court of equity: *Groff v. Rohrer*, 35 Md. 337, citing the principal case. But in England and in this country, the presumption that it is intended as an advancement may be rebutted by proper evidence: *Clark v. Clark*, 27 Id. 700, citing the principal case.

WHILE PROPERTY OF MARRIED WOMAN, not limited, or held to her sole and separate use, is protected from liability for the debts of her husband, his marital rights over it are unimpaired: *Buchanan v. Turner*, 26 Md. 6; *Siz v. Shaner*, Id. 442, 443, citing the principal case.

WHEN STATUTE DIRECTS NOTICE TO BE GIVEN BY PUBLICATION, if the publication is made as directed by the law, notice will be implied, whether it was an actual notice or not: *County Commissioners v. Clagett*, 31 Md. 213, citing the principal case.

NATURE AND EXTENT OF INTEREST of the assured in the insured property, in contracts with insurance companies not mutual, is immaterial to the risk. An omission to state it, where no inquiry is made on the subject, and no conditions exact it, will not avoid the policy unless such omission would operate as an actual fraud upon the insurer: *W. Fire Ins. Co. v. Kelly*, 32 Md. 447, citing the principal case.

EQUITABLE INTEREST IN PROPERTY IS ABSOLUTE INTEREST, and is insurable. Absolute interest is one which is completely vested in the individual, and of which he cannot be deprived without his consent: *Hough v. C. F. Ins. Co.*, 76 Am. Dec. 580.

RESULTING TRUST MAY BE REBUTTED BY PAROL DECLARATIONS of party in whose favor it would otherwise be raised: *Adams v. Guerdard*, 76 Am. Dec. 624.

RESULTING TRUST MAY BE ESTABLISHED or rebutted by parol evidence: *Smith v. Strahan*, 67 Am. Dec. 622, note 630; *Osborne v. Eudicot*, 65 Id. 498; *Irwin v. Ivers*, 63 Id. 420, note 423.

RESULTING TRUST ARISES TO ONE WHO ADVANCES PURCHASE-MONEY, whether title be taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser, whether in one name or several, whether jointly or successively: *Smith v. Strahan*, 67 Am. Dec. 622, where the subject of resulting trusts is fully discussed; see also *Osborne v. Endicott*, 65 Id. 498, note 501; *Irvine v. Ivers*, 63 Id. 420, note 424.

TRUST RESULTS PRO TANTO IN FAVOR OF ONE PAYING CONSIDERATION where only a part of the purchase-money is paid, the purchase being made with joint funds: *Osborne v. Endicott*, 65 Am. Dec. 498. and note 501

KEMP v. COOK.

[18 MARYLAND, 120.]

WRIT OF ERROR CORAM NOBIS LIES to correct an error in fact in the same court where the record is.

POWER OF SETTING ASIDE JUDGMENTS on motion is a common-law power of courts of record, but it was rarely exercised after the lapse of the term in which the judgment was rendered.

IF INFANT FORMS PARTNERSHIP with an adult, he holds himself forth to the world as not being an infant. He practices a fraud on the world.

JUDGMENT AGAINST INFANT IS NOT VOID; it is only voidable. Courts will sustain the acts of an infant and bind him, unless the acts are clearly prejudicial to the infant.

JUDGMENT RECORDS ARE HIGHEST EVIDENCES of the facts determined in such judgment, and it would be contrary to sound public policy and law to permit them to be set aside, altered, or varied without the most solemn forms of proceedings.

IF PARTY HAS KNOWINGLY ACQUIRED IN JUDGMENT complained of, or has been guilty of laches or unreasonable delay in seeking his remedy, relief will not be granted.

THE facts are stated in the opinion.

J. M. Palmer, for the appellant.

Oliver Miller, for the appellee.

By Court, BOWIE, C. J. This is an application to the circuit court of Frederick county, made on the eleventh of October, 1855, to strike out a judgment of Frederick county court, rendered at February term, 1842, to open said cause, and enable the appellee, Hiram Ridgely, one of the defendants, to plead infancy; and to cause the said action to be brought up by regular continuances.

The material facts exhibited by the records are these:

The appellants recovered a judgment, by confession, against the appellees, Cook and Ridgely, at February term, 1842, in Frederick county court, for three hundred and seventy-six dollars and sixty-three cents. on a joint and several promise-

sory note for that amount, signed by the defendants, Cook and Ridgely, on the third of December, 1842; the appellees, Cook and Ridgely, together with E. T. Cook and M. Roderick, superseded the judgment.

On the twelfth of February, 1851, the appellants issued a *sci. fa.* on the judgment of *supersedeas* against all the appellees, whereupon Ridgely, being made known, filed his petition in said case of *scire facias*, alleging he was a minor at the date of the rendition of said first judgment, and that an attorney of the court had appeared and confessed judgment for him; and also alleging that he was a minor at the date of the confession of the *supersedeas* judgment; and praying that the judgment confessed by the attorney for him, and the judgment confessed by way of *supersedeas* by himself and others, may be stricken out, the case reinstated on the docket, and the proceedings on the *scire facias* in the mean time be stayed; and that a rule to show cause be laid on the plaintiffs. The rule was laid as prayed, cause shown, and the rule made absolute, and judgment entered that the original and *supersedeas* judgments be stricken out, and the cause reinstated for trial.

An appeal was taken from this decision of the circuit court for Frederick county; and at December term, 1854, the judgment of the circuit court was reversed, and a *procedendo* awarded: See *Kemp v. Cook*, 6 Md. 307. The record and proceedings being returned to the circuit court for Frederick county, H. Ridgely, the appellee, filed in said court a suggestion in writing, entitled thus: "Judgment, February term, 1842. Lewis Kemp and Daniel Buckey etc. v. Larkin S. Cook and Hiram Ridgely. In Frederick county court, 299 trials"—alleging his infancy at the rendition of the judgment aforesaid, his appearance by attorney, and entry of the judgment by confession, and praying said judgment may be stricken out, the cause opened, the action brought up by regular continuances, and a rule laid on the plaintiffs to show cause, and so forth.

The rule was laid as prayed, cause shown, and it was by the circuit court for Frederick county (October, 1856) considered "that the rule be made absolute, and that the judgment heretofore recovered by Lewis Kemp and Daniel Buckey, use of Lewis G. Kemp against Larkin S. Cook and Hiram Ridgely, be stricken out, and that the said cause be brought up by regular continuances;" it was also considered that the appellants "take nothing by their said writ of *scire facias*, issued in

this case, and that the said writ be quashed, and the appellees recover their costs;" from which judgment the appellants have appealed.

On the sixth of December, 1858, a writ of diminution was issued, under which, and the appeal, the proceedings of the county court and circuit court for Frederick county, above referred to, are brought before this court.

A motion has been made by the appellants to reject the record returned under the writ of diminution.

The appellants insist: 1. The remedy of the appellee, if any, was by writ of error *coram nobis*; 2. The original judgment was merged in the judgment of *supersedeas*, and cannot be judicially separated from it; 3. That the appellee has lost his remedy by laches; 4. That the decision of this court in *Kemp v. Cook*, 6 Md. 305, is conclusive of the question, and no matter which might have been relied on as a defense to the original action can be set up in answer to the *scire facias*; 5. Because the court below refused the judgment of fiat asked by the appellant, and quashed the *scire facias*, and adjudged costs to the defendants in the *scire facias*.

The appellee insisted: 1. That the appearance of an infant by attorney, and confession of judgment, is error for which the judgment should be reversed; 2. That although the relief can be had by error *coram nobis*, this is not the only remedy; 3. That the proceeding in this case is authorized by the act of 1787, chapter 9; 4. That the *supersedeas* judgment is not a bar to relief; 5. There was no laches.

"Since the case of *Hawkins v. Bowie*, 9 Gill & J. 437, there ought to be no doubt, in Maryland, that a writ of error *coram nobis* lies to correct an error in fact, in the same court where the record is. If there be error in the process, or through default of the clerk, it shall be reversed in the same court by writ of error thereon before the same judge:" *Bridendolph v. Zeller*, 8 Md. 333. The office and application of this writ is thus described in Saunders's reports: "So a writ of error may be brought in the same court for an error in fact; thus where an erroneous judgment is given in matter of fact only, and not in point of law, in the king's bench, it may be reversed in the same court by writ of error, which is sometimes called error *coram vobis*, but more correctly *coram nobis*; . . . as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory

judgment:" *Jaques v. Caesar*, 2 Saund. 101 a, note 1; also 2 Tidd's Pr. 1191, to same effect.

The act of 1787, chapter 9 (entitled "An act respecting the continuance of civil suits in the general and county courts"), section 6, gives no additional powers to the court in respect of correcting or setting aside judgments. Assuming the power to be in the court, without regard to the mode, it enacts "that in any case where a judgment shall be set aside for fraud, deceit, surprise, or irregularity in obtaining the same, the said courts, respectively, may direct the continuances to be entered from the court when such judgment was obtained, until the court shall set aside such judgment, and may also continue such cause for so long a time as they shall judge necessary for the trial of the merits between the parties," etc.

The power of setting aside judgments upon motion is a common-law power incident to courts of record, and exercised usually under restraints imposed by their own rules, and rarely after the term has passed in which the judgment was rendered. In *Sherwood v. Mohler*, 14 Md. 565, it was said: "And apart from surprise, fraud, or deceit, the motion [to strike out] was too late; it was not made until nearly the lapse of a year after the judgment of condemnation was rendered; when, according to the well-established practice of this state, it should have been made during the term at which the judgment was given." The appellee, by suggestion in this case, states "that at the time of the rendition of the judgment in the above cause, and at the time of the execution by him of the promissory notes, which are the causes of action, upon which the said judgment was rendered, he was an infant under the age of twenty-one years, having been, at the date of the rendition of said judgment, about eighteen years old, and that said judgment was rendered by confession of Joseph M. Palmer, esq., who professed to act as the attorney of the said appellee in said suit." No deceit, fraud, or surprise, is alleged, and no irregularity, except the appearance of an attorney for him whose actual authority to appear, as far as the defendant's privity and consent could confer such, is nowhere denied.

In *Gibbs v. Merrill*, 3 Taunt. 807, Chief Justice Mansfield says: "If an infant forms a partnership with an adult, he holds himself forth to the world as not being an infant; he practices a fraud on the world."

A judgment against an infant is not void, but voidable. The tendency of the courts is rather to sustain than vacate

their acts, unless they are obviously to their prejudice: *Key v. Davis*, 1 Md. 42; *Ridgeley v. Crandall*, 4 Id. 485; *Levering v. Heighe*, 2 Md. Ch. 81.

The judgment records of the state are the highest evidences of debt known to the law; they are presumed to have been made up after the most careful deliberation, upon trial or hearing of both parties. To permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy. The language of Dorsey, J., delivering the opinion of the court in *Munnikuyesen v. Dorsett*, 2 Har. & G. 377, a case stronger in circumstances appealing to the equitable interference of the court than the present, is as conclusive on principle as in precedent, viz.: "Judgments at law are not lightly to be interfered with, and it must be a case infinitely stronger than the present to induce this court to sanction the striking out of a judgment of almost eight years' standing, in virtue of which, too, in due course of law, another judgment hath been obtained by confession, and execution levied thereunder." See also *Green v. Hamilton*, 16 Md. 326, where *Munnikuyesen v. Dorsett*, *supra*, is cited and affirmed.

In deciding upon an application to strike out a judgment after the term is past, for any of the reasons mentioned in the act of 1787, the court acts in the exercise of its *quasi* equitable powers, and will therefore properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith and with ordinary diligence. Relief will not be granted, when he has knowingly acquiesced in the judgment complained of, or has been guilty of laches and unreasonable delay in seeking his remedy. In this case, the appellee, according to his own showing, reached his majority in 1845, and although aware of the existence of the judgment, and the mode in which it was rendered, made no objection to it, and took no step to avoid it until 1851.

This delay, in our opinion, amounted to laches which would deprive the appellee of the relief sought, even if there was no objection to the mode of proceeding, and the irregularity alleged could be taken advantage of by summary proceeding, on motion, under the act of 1787.

The judgments by the circuit court for Frederick county, being contrary to the principles and precedents above cited, we deem the same erroneous and reverse them.

Judgments reversed.

JUDGMENT THAT HAS BEEN RENDERED SEVERAL TERMS anterior to any action for relief against it ought not to be disturbed. This practice has been long well settled: *Sarlonis v. Fireman's Ins. Co.*, 45 Md. 245; *Post v. Bowen*, 35 Id. 236, citing the principal case. Laches are always fatal in such cases: *Post v. Bowen*, 35 Id. 236, citing the principal case.

EFFECT OF NOTICE ON GARNISHEE PROCESS.—In *Tierman v. Hammond*, 41 Md. 554, 555, the principal case is cited and distinguished from the case under consideration, and is cited to this point in *Johnson v. Lemmon*, 37 Id. 245.

POWER TO SET ASIDE JUDGMENTS for fraud, surprise, or irregularity is a common-law power incident to courts of record; it may be exercised after the term has passed in which the judgment was rendered: *Taylor v. Sindall*, 34 Md. 41, citing the principal case.

WRIT OF ERROR CORAM NOBIS IS NOT WRIT OF RIGHT, but is issued in the discretion of the court. A refusal of the lower court to grant it cannot be revised on appeal. It is granted upon affidavit showing that an error exists in fact, which will destroy plaintiff's right of action: *Tyler v. Morris*, 34 Am. Dec. 395.

WRIT OF ERROR CORAM NOBIS IS PROPER REMEDY to enable a party against whom a judgment has been taken on motion and without notice, to be relieved in the same court by showing error of facts: Note to *Tyler v. Morris*, 34 Am. Dec. 395.

MAYOR AND CITY COUNCIL OF BALTIMORE v. PORTER.

[18 MARYLAND, 284.]

WHERE POWER IS CONFERRED UPON PUBLIC OFFICERS by legislative enactment, such power can be executed by them only in the way directed by the law, and unless the law granting the power is strictly complied with, the acts of the officers are void.

CITY COUNCIL CAN ONLY EXECUTE POWER conferred upon it by statute in the way in which all its powers are executed, by adopting an ordinance for that purpose, prescribing the officer by whom, and the manner in which, the objects of the law should be accomplished.

ORDINANCE PASSED BY CITY COUNCIL, ratifying or confirming an act of an officer after it has been performed by him under a law which provided that the city council should provide for the execution of the act which was performed by the officer, is void, and cannot give vitality to such act; being performed without authority, it is not binding, and cannot be made binding by the city council afterwards.

DOCTRINE OF ESTOPPEL DOES NOT APPLY in cases where an owner of land has petitioned to have a highway, upon which his land fronts, graded, and has presented such petition to an officer who proceeds upon the petition without authority of law, and levies a tax, etc., upon the land for the purposes of the grading. In such a case, the petitioner is not estopped from enjoining an illegal sale of his property to pay said tax.

IF LAW RELATING TO LEVY OF TAX is not strictly pursued by the officers, the tax will be void, and cannot be enforced by a sale of the property upon which it is levied and assessed.

COURT OF CHANCERY HAS POWER TO PREVENT OFFICERS FROM DOING ACT NOT AUTHORIZED BY LAW.

THE facts are stated in the opinion.

G. L. Dulany, H. R. Dulany, J. M. Campbell, G. W. Williams, O. Horwitz, and C. Yellott, for the appellants.

W. F. Frick, C. H. Pitts, and G. O. Maund, for the appellees.

By Court, GOLDSBOROUGH, J. For several years prior to the incidents which induced the controversy in this case, the city of Baltimore was blessed with a prosperity strikingly illustrated by its material expansion. The waste places within her jurisdiction were, day by day, disappearing under the advance of this expansion. Her highways were being extended, and were affording uninterrupted intercourse to her citizens from one extremity of the city to the other. This state of prosperity begat a corresponding public feeling, from which, in 1852, arose the determination to lay out and establish an avenue one hundred feet wide on the confines of the city, to be denominated the North avenue. In that year, certain real estate was condemned, to form the bed of this improvement, between Pennsylvania and York avenues, under an ordinance of the corporate authorities, by which it was declared that the opening and condemnation of North avenue, as a public highway, would be a great public improvement and result advantageously to the community. Though the bed of the avenue had been condemned for several years as a public highway, it continued useless for that purpose for want of authority to grade it. It became, therefore, necessary to obtain the passage of a law, under the provisions of which it could be made practically useful as a great public convenience. And for this purpose the act of 1856, chapter 164, was passed. After the passage of that act, a number of the proprietors of land lying upon the avenue, representing themselves to be "the owners of a majority of front feet," made application to the city commissioner to have the same graded. Upon this application, the city commissioner went on to have the work done, and assessed upon the property a tax to pay the cost and expense of the grading, making such assessment upon all the adjoining property equally, according to the number of front feet, in the same manner as in the ordinary case of a street lying

wholly within the limits and jurisdiction of the city, and without making any ascertainment of damage to the owners, or any of them. He then proceeded to place the tax list in the hands of the collector, who advertised the property of the appellee for sale, on account of its non-payment.

An injunction was granted by the circuit court, at the instance of the appellee, to prevent the sale, and this appeal was taken from the order of the second of June, 1860, continuing the injunction.

A great deal of evidence was taken in the case upon the disputed question whether the application, for the grading of the avenue, had been signed by persons owning a majority of the feet fronting thereon, as required by law, and also for the purpose of showing the manner in which the work of grading had been done, and the consequent damage and injury alleged to have been suffered by many of the adjoining proprietors.

But in disposing of the present appeal, it is quite unnecessary to decide upon those questions, or to pass upon the various exceptions to the evidence presented in the record. The affirmance of the action of the circuit court may be properly rested on the broad ground that the city commissioner had no legal power or authority to cause North avenue to be graded, and that all his proceedings in the premises were *coram non judice* and void. This conclusion is based on the construction of the act of 1856, chapter 164.

By reference to the pre-existing laws and ordinances, it will be seen that the two systems for opening and condemning streets, and for grading and paving them, are essentially different from each other; they are provided for by different laws and ordinances, executed by different officers, and governed by different rules and regulations.

This will plainly appear by reference to the revised ordinances of 1850, numbers 15 and 17, and the acts of assembly under which they were respectively adopted. In passing the act of 1856, chapter 164, the legislature seems to have blended the two systems; and hence some difficulty has arisen in giving such construction to that act as will make all its provisions harmonize with each other. In its title, it is declared to be supplementary to the act of 1838, chapter 226, which relates to opening and condemning streets. In its first section it contains, like the act of 1838, provisions for ascertaining the damages as well as the benefits which will be caused to the owners of adjoining lands by the grading, and requires, as a

preliminary to any proceeding under the law, that the mayor and city council shall determine the proposed work to be consistent with the public good. And the fourth section provides that an appeal shall be granted to the owners of property, from the assessments of benefit and damage arising from the grading or paving of the avenue.

In these respects, the law is very similar, in its provisions, to the act of 1838, and wholly unlike the existing laws and ordinances relating to the grading and paving of streets in the city of Baltimore. In the action that was taken by the city commissioner, those provisions of the law were wholly disregarded, and the record shows that he proceeded in the same manner as is contemplated by ordinance number 15 of 1850, and as in the ordinary case of a street lying in the city, with the property adjoining thereto, on both sides, within the city jurisdiction. Inasmuch as the property adjoining North avenue, on one side, lies in the county of Baltimore, it was not competent for the mayor and city council to make any assessment on such property for the expense of grading and paving it, without some further legislation on the subject; hence the necessity for the act of 1856.

The great extent and cost of the work, the irregularity of the surface over which it passes, with the very great embankments and excavations required, and the consequent damage that might result to some of the adjoining property from the grading, no doubt suggested to the legislature the propriety of making different provisions of law from those applicable to the ordinary cases of grading and paving a street lying wholly within the limits of the city. However that may be, it is sufficient to say, that independent of the act of 1856, the city authorities possessed no power to grade the North avenue.

Their powers being derived under that act alone, within its provisions are to be found prescribed the rules and directions to which the mayor and city council must conform in executing those powers.

It was not a case to which the ordinance No. 15 of 1850 was at all applicable; and the city commissioner, acting under that ordinance, possessed no jurisdiction or authority to act in the matter.

The power is conferred by the act on the mayor and city council, and could be executed by them only in the way in which all their powers are executed, by an ordinance adopted for that purpose, prescribing the officer by whom and the man-

ner in which the objects of the law should be accomplished; and providing the time and manner in which an appeal might be had by the parties interested.

Being a work of great magnitude and expense, involving not only private interests, but also of public concern, the act requires that the mayor and city council shall first determine that it is "consistent with the public good."

No such preliminary determination was made, nor was the application addressed to them, or any action had by them upon the subject.

Under these circumstances, it is impossible to say that the action of the city commissioner was authorized by any law or ordinance, without which the payment of the tax assessed by him cannot be enforced by a sale of the appellee's property.

It was urged that as the appellee signed the application to the city commissioner for grading the North avenue, he should be precluded from taking advantage of the want of authority to perform the duties under the act of 1856. We do not think that this proposition is tenable. If the appellee was ignorant of the duties of the commissioner, and signed an application which it was not lawful for that officer to entertain, it would not preclude the appellee from availing himself of the nullity of the subsequent proceedings—certainly it would not debar him from interfering to stop an unlawful sale of his property, which would have been one of the consequences of the act of the commissioner.

The principle of estoppel has no application to the case. The law requires the application of the owners of a majority of the feet of property fronting on the avenue, before any steps can be taken by the corporation to have it graded; but because the appellee has signed such an application, it surely cannot be successfully maintained that he assented that the work should be done in any other way than the law requires; or, if he had so assented, that such assent could confer any power upon the city commissioner not possessed by him under the laws and ordinances of the city.

The ordinance afterwards passed, on the ninth day of December, 1859, to confirm the grading of North avenue, not being authorized by any law, was not of binding force, and could not have the effect of ratifying the acts of the city commissioner, or in any manner change the rights of the parties litigant.

In the argument of the case, the question of jurisdiction was

argued with great ability. The counsel for the appellant insisted that a court of chancery has no jurisdiction to grant the relief asked for in the bill, the only remedy being in a court of law, by an appeal from the proceedings of the city commissioner, under the act of 1856, or by *certiorari*; and the case of *Methodist Protestant Church v. Mayor and City Council of Baltimore*, 6 Gill, 391 [48 Am. Dec. 540], was referred to in support of this position. But that case is unlike the present. There the street commissioners were acting within the scope of their authority, and if the allegations of the bill were true, the acts complained of were but irregularities, subject to be reviewed on appeal by the tribunal appointed by law for that purpose. Here the city commissioner acted without any lawful authority. His acts are not merely irregular, but void. In *Williamson v. Berry*, 8 How. 543, the supreme court say: "The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."

The principles on which a court of equity interposes by injunction to arrest the illegal proceedings of public functionaries are stated by Lord Chancellor Cottenham in *Frewin v. Lewis*, 4 Myl. & C. 249, 18 Eng. Ch. 249, cited with approbation by Mr. Justice Story, in 2 Story's Eq. Jur., sec. 955 a. In *Holland v. Mayor and City Council of Baltimore*, 11 Md. 186 [69 Am. Dec. 195], the jurisdiction of the court of chancery was maintained, under circumstances and upon grounds which completely cover this case.

Order affirmed, and injunction made perpetual.

In the case of *Mayor etc. v. Horn*, 26 Md. 199, the court, on page 204, gives the history of that case, by which it appears that it arose out of the principal case, and the latter case is commented upon and approved in all particulars decided therein. After the decision of the principal case, the legislature passed an act authorizing the city of Baltimore to pay for the work done in grading North avenue, which had been accepted by the city, and to borrow money therefor, and to levy a tax for its repayment. This tax was to be levied upon the property fronting upon the avenue. The court, upon the matter being brought before it on a contempt proceeding, held the law to be unconstitutional, and enjoined any further attempts to collect said tax. The case of *Lester v. Mayor*, 29 Id. 420, arose under the same law as did the principal case, and that case is mentioned therein but no point stated.

In the case of *Horn v. Mayor*, 30 Md. 222, a case arising also out of the grading of North avenue, the principal case is followed and approved to the point that the grading said street was an unlawful and unauthorized act;

be found guilty. The defendant was found guilty, and alleged exceptions.

A. R. Brown, for the defendant.

Phillips, attorney-general, for the commonwealth.

By Court, BIGELOW, C. J. 1. Evidence of the general character of the females for chastity, who frequented the house, was competent proof to show that it was of bad repute: *Commonwealth v. Kimball*, 7 Gray, 328. It was the general character or reputation of these persons in the community to which the witnesses testified, and not to their actual knowledge of their personal traits or conduct. This is manifest from the fact stated in the exceptions, that the witnesses knew nothing of the females seen in the house, except by report.

2. It does not appear that the inquiry concerning the character of these females was extended beyond the issue. In the absence of any statement in the exceptions to the contrary, it must be assumed that the evidence on this point was relevant and material, and was properly confined to their reputation for chastity and good behavior.

3. Evidence that there was no noise or disturbance of the peace in the house, or annoyance to the persons residing in the neighborhood, was wholly immaterial. It did not tend to meet the case proved by the government. The nuisance consisted in keeping a house where wicked and dissolute people resorted, to the injury of good morals, and to the evil example of others: *Commonwealth v. Kimball*, 7 Gray, 330.

4. The instructions to the jury were correct. If the defendant aided and assisted others in committing the offense charged in the indictment, he was equally guilty, in the eye of the law, with those who actually hired and controlled the house. In misdemeanors, all who participate in the criminal act are deemed to be principals.

Exceptions overruled.

EVIDENCE OF GENERAL BAD CHARACTER OF INMATES OF HOUSE is competent to prove house to be house of ill-fame: *State v. Hand*, 71 Am. Dec. 453, note 454.

IN MISDEMEANORS THERE ARE NO DEGREES, AND NO DISTINCTION BETWEEN PRINCIPALS AND ACCESSARIES before the fact, but all who participate in the commission of the offense are principals, and may be charged in the indictment as such: *Commonwealth v. Wallace*, 108 Mass. 14; *Commonwealth v. Dowling*, 114 Id. 260; *United States v. Boyer*, 13 Nat. Bank. Reg. 402, citing the principal case; see note to *State v. Hildreth*, 51 Am. Dec. 375.

FLETCHER v. BOSTON AND MAINE RAILROAD.

[1 ALLEN, 2.]

ANSWERS OF WITNESS MADE UPON CROSS-EXAMINATION AS TO COLLATERAL MATTERS are conclusive, and he cannot be contradicted, and if evidence be admitted for this purpose, a new trial may be granted.

CROSS-EXAMINATION OF AGENT OF DEFENDANT AS TO ACTS AND DECLARATION which there was no proof he had authority to make relates to collateral matters, and the answers of the witness are therefore conclusive upon the plaintiff.

IT IS IMMATERIAL TO WHOM TRAIN CAUSING INJURY BELONGS if it was in the care of the defendants' servants, subject to their exclusive direction and control at the time of the accident.

RAILROAD COMPANY IS NOT LIABLE FOR INJURY CAUSED BY COLLISION WITH FREIGHT-CAR OF ANOTHER COMPANY which the plaintiff was loading, and which for the purpose of being loaded was placed by such other company upon a side-track of the defendants, which was in constant use by other roads, if such other company failed to use reasonable care that no collision should take place with the freight-car.

RAILROAD COMPANY IS NOT LIABLE FOR INJURY CAUSED BY COLLISION which resulted from the negligence of another company which in connection with the defendants made use of the defendants' track under a lease from the defendants, and ran trains on its own account over the track.

TERM "ORDINARY CARE" HAS RELATION TO SITUATION OF PARTIES and business in which they are engaged, and varies according to the exigencies which require vigilance and attention conforming in amount and degree to the particular circumstances under which they are to be exerted.

TORT for personal injuries caused to plaintiff by a train being driven violently against a freight-car which the plaintiff was loading, and which was standing upon the defendants' track. The accident occurred at the defendants' depot at Lawrence. About two miles from this depot was the terminus of the Essex railroad, which was permitted to run its cars into Lawrence over the defendants' track. The plaintiff, desiring to send some freight over the Essex railroad, applied to the company's agent in Lawrence, who informed him that the company had a car at Lawrence which he could have. Upon application by the Essex company's agent at the defendants' freight-office, this car was brought from where it was standing down to the defendants' depot upon a track called the "east side-track," and the plaintiff was loading the car, which was a close car, and was inside the same and out of sight of any one upon an approaching train, when a train was backed upon this side-track, and colliding with the car, caused the injuries complained of. There was no evidence of any provisions made, either by the Essex company or the plaintiff, to guard against an acci-

dent. The defendants contended that the collision happened upon a track leased to the Concord Railroad Company, and that the train causing the collision did not belong to the defendants, and that they had no control over it, and they introduced a contract between the Concord Railroad Company and themselves, leasing to the former the Methuen Branch Railroad, upon which the accident occurred, and which belonged to the defendants, together with the joint use of the side-tracks for specified purposes. It was stipulated in this agreement that the Concord Railroad Company should deliver its down freight at Lawrence on side-tracks, and that the defendants should receive such freight, and do the necessary shifting and arranging of cars. There was evidence tending to show that the colliding train belonged to the Concord Railroad Company, and was switched off and backed upon the "east side-track" while under the charge of the engineer and conductor of the train, and that the collision occurred while the train was thus controlled, and that the defendants never assumed any authority over such trains until they were placed upon side-tracks by their conductors. The objection of the defendants that the plaintiff could not recover under the allegations of his declaration, that the injury was caused by the cars and engine of the defendants, since there was no evidence that the defendants owned the cars or engine which collided with the freight-car, was overruled. The court charged as follows: If the car of the Essex Railroad Company was placed on this side-track by the permission of the defendants, as a favor to the station agent of the Essex company or to the plaintiff, who was about to load a car of the Essex company, to transport his merchandise on the Essex road, and the defendants had no interest therein, but it was allowed by the agent of the defendants upon the request of the agent of the Essex company, or of the plaintiff, the rule of law as to the liability would be this: 1. As to the defendants: the defendants are responsible for any injury occasioned by the acts of their servants which might cause such injury, if the same occurred through want of proper care and prudence on their part; that if the train by which the injury was caused was in the care of the servants of the defendants, subject to their exclusive direction and control at the time of the accident, then it is immaterial who in fact were the owners of the engine and cars constituting said train; 2. As to the Essex company: if the injury to the plaintiff resulted from the negligence of the agents of the Essex company, the defendants

are not responsible; that if the Essex company elected to place its car which was to be loaded by the plaintiff upon a side-track which was in constant use by other roads, the Essex company was bound to use reasonable care that no collision should take place in reference to such car; and that if the plaintiff received the injury while engaged in loading the car, and there was a want of proper care on the part of the Essex company, and in respect to the same, the plaintiff cannot recover; 3. If the injury resulted from the negligence of another railroad company which had a lease of the railroad, and which was running on its own account, and which, in connection with the defendants, made use of the tracks at this place under a privilege secured by the lease, then the defendants are not responsible in this action; 4. If the injury happened from want of ordinary care and prudence on the part of the plaintiff in his manner of using the privilege, as the plaintiff was bound to use ordinary care and diligence in the use of the car, and in avoiding a personal exposure to injury, then the plaintiff cannot maintain his action. The facts concerning the question of the admissibility of the evidence introduced to contradict the testimony of the witness Hardy, on cross-examination, are stated in the opinion. Verdict was for the plaintiff, and the defendants alleged exceptions.

T. Wentworth and N. G. White, for the defendants.

N. W. Harmon, for the plaintiff.

By Court, CHAPMAN, J. In this action, the plaintiff alleges that while he was loading a certain freight-car, standing on the defendants' track in Lawrence, under the authority and by the direction of the defendants, he was injured by reason of a freight train of the defendants being violently driven against the car. Daniel Hardy, the station agent, was called by the defendants as a witness; and on his cross-examination testified that he never asked the plaintiff, or Gowan, the plaintiff's partner, for a bill of the damage done to the plaintiff; that he never obtained of the plaintiff, or his partner, more than one bill; that he never said that Clark, who was a clerk in the defendants' freight-office, and was on the train that caused the collision, was going away, and he wanted a bill of the damage, as he wished to take the amount of it out of his wages, or make him pay it; that he had no recollection of more than one bill, or that he said to Gowan he would send a second bill to Boston; or that he said Clark was very careless. All this

cross-examination related to matters not admissible in evidence, or pertinent to the case. There was no evidence tending to show that he had authority to ask for a bill of the damage, or to call on Clark for payment, or to make admissions as to Clark's carelessness. And if he had been an agent, with authority to manage this business, his admissions, not connected with his acts as agent, would be inadmissible.

It is well settled that when a witness is cross-examined as to collateral matters, his answers are conclusive, and he cannot be contradicted. The authorities are numerous; and it is sufficient to refer to *Commonwealth v. Cain*, 14 Gray, 7, and the authorities there cited. Gowan's deposition was admitted to discredit Hardy. He deposed that Hardy did request him to make out a bill of the damage and hand it in, and he would send it to Boston to see if it would be allowed; also that he said Clark was very careless in the matter; also that he said Gowan had better go to Boston and see the parties there, and gave Gowan their names; also that Hardy afterwards called on him for another bill of the damages, as Clark was going away, and he wanted him to pay it. This testimony, which we understand was admitted with much hesitation and doubt, appears, on careful consideration, to be inadmissible, for the reasons above stated; it could not fail to influence the jury, and therefore the verdict must be set aside, and a new trial granted.

As a new trial must be had, it is proper to express an opinion upon some other points that have been argued.

1. The defendants contend that the court erred in ruling that it was immaterial to whom the train belonged. But taking the whole ruling together, it is clearly right. The ruling is, that "if the train by which the injury was caused was in the care of the defendants' servants, subject to their exclusive direction and control at the time of the accident," then it is immaterial who in fact were the owners of the engine and cars constituting the train. This must be so; for if a wrong was done, it was by those who had the exclusive direction and control of the train at the time, and by no others.

2. The fourth instruction to the jury, as to the use of ordinary care, is objected to. It is contended that the plaintiff, being in a dangerous situation, should have used extraordinary care, and that the jury should have been instructed upon the evidence as matter of law that he did not use due care.

But the court are of opinion that the instruction was correct. "Ordinary care" is a term that has relation to the situation

of parties and the business in which they are engaged. It is used here as synonymous with the term "reasonable care" as used by the courts in England. "Care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted:" *Holly v. Boston Gas Light Co.*, 8 Gray, 131 [69 Am. Dec. 233].

There are cases where, there being no facts in dispute, ordinary care becomes a question of law; but this does not seem to be such a case. If the track where the plaintiff was loading his marble was one that was exclusively used for loading cars, then no care would seem to be required on his part to avoid collisions; but if it was one on which trains were deposited on their arrival, or used for shifting cars and making up trains, and if in doing such business it is customary and prudent to run a train against a car that happens to be standing on the track and push it out of the way, then ordinary care would require a person who should go into such a car thus exposed to be moved, and who should there engage in a business that would place him in danger if the car were moved, to make some reasonable provision for his safety, such as would be adapted to the circumstances. So far as the report states the case, it tends to show that the plaintiff exposed himself to danger without using any precaution. But the evidence is not fully reported. Enough appears, however, to show that the question of ordinary care depends upon many facts of a complicated character, and that the question should be left to the jury under instructions. The court are of opinion that each of the four instructions given to the jury was correct.

Exceptions sustained.

ANSWERS AS TO IRRELEVANT MATTERS ELICITED ON CROSS-EXAMINATION are conclusive, and cannot be contradicted: *Combs v. Winchester*, 75 Am. Dec. 203, and note 207. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence: *Kaler v. Builders' Ins. Co.*, 120 Mass. 336, citing the principal case.

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WHETHER DUE CARE HAS BEEN EXERCISED, OR NEGLIGENCE EXISTS, is ordinarily a question of fact at common law, and depends often upon a great variety of circumstances: *Sawyer v. Eastern Steamboat Co.*, 74 Am. Dec. 463, note 469; note to *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 721. Ordinary care is that degree of care which, under the same circumstances, would be exercised by a person of ordinary prudence: *Swann v. Brown*, Id. 568, note 570. The words "ordinary care" mean reasonable care, or due care, that is, such

care as men of common prudence usually exercise in the management of their own concerns; and what is reasonable or due care depends in every case on the subject-matter to which the care is to be applied, and the circumstances attending that subject-matter at the time when the care is required: *Sullivan v. Scripture*, 3 Allen, 566; *Fallon v. Boston*, Id. 39; *Cunningham v. Hall*, 4 Id. 276, citing the principal case.

LIABILITY OF RAILROADS FOR TORTS OF THEIR LESSEES.—This subject is treated in the note to *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295-298.

PASSENGER INJURED BY COLLISION RESULTING FROM CONCURRENT NEGLIGENCE OF TWO RAILROAD COMPANIES may recover against both or either: *Chapman v. New Haven R. R. Co.*, 75 Am. Dec. 344, note 347; *Colegrove v. New York etc. R. R. Co.*, Id. 418, note 419.

RAILROAD COMPANY IS LIABLE AS PASSENGER CARRIER when cars of another company containing passengers are transferred to its road attached to the engine, and wholly committed to the supervision and control of its agents and conductors: *Schopham v. Boston etc. R. R. Co.*, 55 Am. Dec. 41; see *Sprague v. Smith*, 70 Id. 424, note 429.

TRUSTEES AND RECEIVERS OPERATING RAILROAD ARE LIABLE AS COMMON CARRIERS: *Sprague v. Smith*, 70 Am. Dec. 424, note 429. The principal case is cited to the point that a railroad company is not liable for an injury resulting from a collision when its train was at the time under the control of a receiver appointed by the court, and his servants and agents: *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 557.

SPARHAWK v. CITY OF SALEM.

[1 ALLEN, 30.]

CITY IS NOT LIABLE FOR INJURY HAPPENING TO TRAVELER while straying outside of an unfenced highway, when the whole highway, and the land adjoining it, are safe and convenient to travel upon.

CITY IS NOT BOUND TO FENCE HIGHWAY MERELY TO PREVENT TRAVELERS from straying out of highway, when there is no unsafe place immediately contiguous to the way.

TORT for injury from alleged defective highway, the alleged defect being the absence of a fence. The highway in question was one which the defendant was bound to keep in repair. It passed the land of the Essex Railroad Company, and a station of this company was situated forty feet from the limits of the highway. Between the station and the highway the surface of land was smooth and even, and was not separated from the street by a fence for a part of the way. There was an embankment at one end of the station, and the plaintiff's agent, while driving the plaintiff's horse and carriage over this street in the evening, drove outside the line of the street, opposite the station, upon and across the land of the railroad company, and down the embankment, thus causing the injury in question. Upon these facts, the defendant requested the court to charge

that there was no defect in the highway for which the city was liable. This request was refused, and the verdict being for the plaintiff, the defendant alleged exceptions.

W. C. Endicott, for the defendant.

J. C. Perkins and E. W. Kimball, for the plaintiff.

By Court, CHAPMAN, J. It appears that the highway in question was safe and convenient for travelers throughout its entire width; and the land adjoining it was also safe and convenient to travel upon. After getting entirely outside the highway in safety, the traveler must proceed still farther in order to reach a dangerous place. If he reached that place and was injured, the want of a railing was remotely, and not immediately, connected with the injury. If cities and towns are bound to protect travelers against such dangers, by erecting railings to prevent them from straying out of the highway, it is difficult to see the limit of their liability. In passing over an unfenced plain in the night-time, the traveler might stray away from the road to a great distance, at the risk of the town, unless they fenced in their whole highway. Or he might, by mistake, enter a private way, or an open space, such as is often left about a farm-house; or a large public common, or an unfenced forest, and hold the town responsible for any injury he might receive there, because they had not fenced against the private way, or open space, or common, or forest. Indeed, they would be liable to him for any injury he might receive from coming in collision with any building or structure in the city by straying beyond the limits of a street in the dark, unless they provided railings along all their public streets.

But none of the cases cited sanction the doctrine that railings are necessary merely to prevent travelers from straying out of the highway, when there is no unsafe place immediately contiguous to the way. On the contrary, these cases require the party to show that the defect which caused the injury existed either in the highway, or so immediately contiguous to it as to make it dangerous to travel on the highway itself: *Snow v. Adams*, 1 Cush. 443; *Palmer v. Andover*, 2 Id. 600; *Cogswell v. Lexington*, 4 Id. 307; *Collins v. Dorchester*, 6 Id. 396; *Tuttle v. Holyoke*, 6 Gray, 447; *Hayden v. Attleborough*, 7 Id. 338. By statute, the highway must be made safe and convenient for travelers; and where, in traveling near the edge of the way, there is danger of being precipitated down an embankment, or into an excavation, or into water, a railing is

necessary to make traveling on the highway safe. Without it, there would be immediate danger. It is for this reason that an action is given for want of sufficient railing, as well as for defect, or want of repair.

The danger in the present case arose from the darkness; and if there had been a railing, the plaintiff's carriage might have been driven against it. But the city was not under obligation to furnish a light.

If the want of a railing at this place were a defect, the city would be liable to an indictment for neglecting to place one there. But it cannot be that cities are liable to indictment for neglecting to place a railing in front of every smooth and level space adjoining their streets which the owner may leave unfenced. Such a railing would generally be an obstruction to the beneficial use of the streets, and would more frequently create danger than prevent it.

Exceptions sustained.

LIABILITY OF INDIVIDUALS OR TOWNS FOR INJURIES FROM EXCAVATIONS AT ROADSIDE, BY REASON OF FAILURE TO MAINTAIN FENCES OR GUARDS.—The owner of land adjoining a highway is bound to use ordinary care in maintaining his own premises in such a condition that persons lawfully using the highway may do so with safety. And if he makes excavations on his own land so near a highway that travelers thereon accidentally slipping fall into them, he is liable for the injury thus sustained: *Shearman & Redfield on Negligence*, sec. 359; *Whittaker's Smith on Negligence*, 66; *Vale v. Bliss*, 50 Barb. 364; on the ground that such excavations amount to a public nuisance. The excavation, to render the land-owner liable, must be one so near as to render the highway unsafe and dangerous to a traveler using ordinary care: *Beck v. Carter*, 68 N. Y. 283. In *Norwich v. Breed*, 30 Conn. 535, it is said that the liability does not depend so much on how near to the sidewalk the excavation is, but on the question whether, under the circumstances, it rendered traveling on the highway dangerous. The rule is best stated in *Hardcastle v. South Yorkshire R'y Co.*, 6 Hurlst. & N. 72, where the court say: "When an excavation is made adjoining to a public way so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land, before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night, and losing his way, may wander to any extent, and if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a

fact to the jury whether the excavation was sufficiently near to the highway to be dangerous."

It has been held that the fact that one in endeavoring to pass along the highway, in order to avoid the excavation or obstructions by the owner of the land, goes on the excavated land, does not of itself bar his right of recovery for any injury sustained thereby: *Vale v. Bliss*, 50 Barb. 358.

But the owner of land is not bound to take precautions against injury to persons straying from the highway, however innocently; nor is he at all restricted in the use of his land, except so far as it adjoins the highway; nor is he bound to fence out travelers; nor to fence excavations, unless they are so near the road as to be dangerous to persons lawfully using it: *Shearman & Redfield on Negligence*, sec. 359; *Hounsell v. Smyth*, 7 Com. B., N. S., 729; *Binks v. South Yorkshire R. & R. D. Co.*, 3 Best & S. 244. A person creating or increasing danger by excavating near a highway is not absolved from liability because of a statutory obligation on some one else to fence the highway, which duty has been neglected: *Wellor v. Dunk*, 4 Fost. & Fin. 298. As to what has been considered near to the highway, so as to render the adjoining proprietor liable, see the following cases: In *Homan v. Stanley*, 66 Pa. St. 646, and *Barnes v. Ward*, 9 Com. B. 392, the defendant's cellar was carried to the line of the highway, and left unguarded, and he was held liable for injury thereby to a passenger. So the defendant was held liable where there was an unguarded, descending roll-way within a foot of the sidewalk: *Stratton v. Staples*, 59 Me. 94; where there was a hoist-hole fourteen inches from the public way and unfenced: *Hadley v. Taylor*, L. R. 1 C. P. 53; an excavation within several feet of the highway: *Norwich v. Breed*, 30 Conn. 535; or from seven to twelve feet from the highway: *Beck v. Carter*, 68 N. Y. 283; an excavation two feet two inches from the sidewalk: *Vale v. Bliss*, 50 Barb. 518. See also *Haughey v. Hart*, 62 Iowa, 96; *Young v. Harvey*, 16 Ind. 311. In *Howland v. Vincent*, 10 Met. 371, however, one or two feet from the highway was held sufficient to protect the defendant from an action. But in *Shearman & Redfield on Negligence*, sec. 505, and *Whittaker's Smith on Negligence*, it is said that the case is doubtful authority, and a decision which it would be difficult to justify; and in *Vale v. Bliss*, 50 Barb. 364, the same remark is made concerning that case, and the court say that "on examination, it will be seen that the court did not consider the question of nuisance, nor was the point presented."

But it is held that an excavation made within twenty-four feet of the highway need not be guarded or separated in any manner from the road, and that one who, in the night, strays into the excavation without any fault of his own, cannot recover damages: *Binks v. South Yorkshire R'y & R. D. Co.*, 3 Best & S. 244. And so where there is a pit or quarry on the waste somewhere between two roads, not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons passing along either of the public ways, but to persons who might accidentally deviate or stray from the highway, or might have occasion to cross the waste for the purpose of passing from one road to the other, no right of action arises on behalf of one injured by the excavation: *Hounsell v. Smith*, 7 Com. B., N. S., 742.

Liability of Towns.—Towns, counties, or other municipalities, where they are bound to furnish a safe highway, and are liable for defects or want of repairs therein, are bound to erect railings or barriers where necessary at the roadside for the safety of passengers or travelers, and the want of such a protection is a defect in the highway for which the town or municipality is liable: *Deering on Negligence*, secs. 173, 192. "The only ground, however,"

says Metcalf, J., in *Jones v. Walkham*, 50 Am. Dec. 783, "upon which the town can be held liable is, that there was a dangerous place on the roadside which required a fence or barrier to make the road safe for travelers. But when a town has no power to erect such fences or barriers, it is not answerable for the consequences which follow from the want of it." To the same effect, see *Beardsley v. Hartford*, 50 Conn. 529; S. C., 47 Am. Rep. 684.

The failure of a town to erect fences or barriers in front of dangerous excavations at a roadside will render the town liable for injuries caused thereby: *Hayden v. Attleborough*, 7 Gray, 338; although an action might at the same time lie against the owner of the adjoining premises, and this latter fact would be no defense to an action against the town: *Bunch v. Edenton*, 90 N. C. 431. In *Alger v. Lowell*, 3 Allen, 402, it is held that an action lies against a city to recover damages sustained by reason of the want of a railing at a point so near to a declivity, outside of the limits of the street, as to make the street dangerous for travelers, although the injury is not received by passing down the declivity directly from the street itself. So a town was held liable for an injury sustained by a traveler on a highway by driving off a steep and unguarded embankment six inches outside the highway, in the dark, the highway being wrought up to that point: *Dress v. Sutton*, 55 Vt. 586; S. C., 45 Am. Rep. 644. But in *Adams v. Natick*, 13 Allen, 433 (citing the principal case), it is held that neither a bank of two and a half feet in height, formed by the side of the road, nor the vicinity of the shallow margin of a lake, were of so dangerous a character as to require the town to maintain a railing across an opening at that place. And the rule that a municipality must keep the approaches to dangerous places on its streets so guarded as to protect travelers applies to the extent of requiring protection of the streets so that even skittish horses may be employed without danger: *Pittson v. Hart*, 89 Pa. St. 389; and where a railroad ran parallel with a highway, which was twelve feet above the level on which the railroad ran, and a team on the highway, being scared by a passing engine, ran over the unguarded side of the highway and was injured, the town was held liable: *Id.* So in *Wood v. Groton*, 111 Mass. 357, where the plaintiff was driving along the traveled way, which at the time was fourteen inches from the edge of an embankment, and his horse shied, and by reason of the want of a railing or barrier the wagon was overturned and the plaintiff injured, it was held that the town was liable. And where, on account of the want of a railing, a horse went over an embankment at the side of a road, and while under the same impulse or impetus, slipped down on the ice below, and was injured, it was held that the town was liable; but the court said that if the plaintiff's horse had passed the embankment in safety, and while proceeding in the adjoining field had stepped on ice and slipped down, and thus been injured, the plaintiff could not have recovered: *Stevens v. Boxford*, 10 Allen, 27, where the court distinguished the principal case by the fact that in it the facts showed that the plaintiff had proceeded a considerable distance before the injury happened.

Railings are not Necessary merely to prevent travelers from straying out of the highway where there is no unsafe place immediately contiguous to the way; and the principal case is cited to this effect in *Murphy v. Gloucester*, 105 Mass. 472; *Commonwealth v. Wilmington*, Id. 601; *Stockwell v. Fitchburg*, 110 Id. 311; *Marshall v. Ipswich*, Id. 526; and *Puffer v. Orange*, 122 Id. 391. And this is the rule, although there is a dangerous place at some distance from the highway which they may reach by so straying: *Puffer v. Orange*, 122 Mass. 389; as at a distance of twenty-eight feet: *Daily v. Worcester*, 131 Id. 482. And where a pedestrian on a city sidewalk at night intentionally turned off

the street to take a by-path, and was injured by falling off the projecting end of a culvert, it was held that the city was not liable by reason of not having erected a railing at that point: *Scranton v. HW*, 102 Pa. St. 378; S. C., 48 Am. Rep. 211. So it is not the duty of a city to provide means of access from private property to its streets, nor is it liable for failure to guard its streets from approach at points where such approach is dangerous. Thus where a plaintiff, following a foot-path across a vacant lot, fell down an embankment into the street, it was held that the city was not liable: *Goodin v. Des Moines*, 55 Iowa, 67.

Question as to whether Dangerous Place outside Limits of Highway is so near the Road as to render the road unsafe for travel if unprotected, has been held to be a question for the jury: Warner v. Holyoke, 112 Mass. 382; but see, to the contrary, the quotation from *Hardcastle v. South Yorkshire Ry Co.*, 6 Hurlst. & N. 72, *supra*.

THE PRINCIPAL CASE IS CITED in *Randall v. Eastern R. R. Co.*, 106 Mass. 277, and *Marshall v. Ipswich*, 110 Id. 526, to the point that cities and towns are under no obligation to light highways, and that a failure so to do is not negligence.

BENNETT v. HOOD.

[1 ALLEN, 47.]

JUDGMENT IN REPLEVIN AGAINST ONE OF TWO JOINT TAKERS FOR PORTION OF CHATTELS TAKEN and nominal damages, under which all the property is recovered, some of it, however, in a damaged condition, is a bar to a subsequent action against both takers for further damages for the taking and detention.

WHERE PORTION OF CHATTELS CANNOT BE REPLEVIED, BECAUSE DEFENDANTS HAVE DESTROYED, concealed, or sold such portion, the plaintiff may replevy that part of the property that can be found, and maintain a separate action to recover the value of that which had been thus severed, *semble*.

DOCTRINE THAT ACTION LIES AGAINST EACH OF SEVERAL CO-TRESPASSERS, and that plaintiff may elect *de melioribus damnis*, does not permit that one, after obtaining a judgment in replevin against one trespasser, may afterwards sue the other for damages, or that he may afterwards maintain a joint action against both.

TORT. The opinion states the case.

S. B. Ives, jun., and J. B. Peabody, for the plaintiff.

D. Saunders, jun., and E. J. Sherman, for the defendants.

By Court, CHAPMAN, J. This is an action of tort, in which it appears that the two defendants, by a single tortious act, took the articles sued for, namely, a daguerreotype saloon, a camera, and a lot of pictures and chemicals. The plaintiff heretofore brought a writ of replevin against Schuyler C. Bennett, one of the defendants, for the saloon and camera. When these articles were returned to the plaintiff, the pictures and

chemicals, which were in the saloon when it was taken by the defendants, were still in it, and came back to the plaintiff's possession with it, but in a damaged state. He obtained judgment for the goods replevied, and one dollar, being nominal damages for the detention; and it is objected that this judgment in replevin is a bar to the present action.

The court are of opinion that this objection is valid. If the defendants had destroyed, concealed, or sold a portion of the property, so that it could not be replevied, the plaintiff might have had some reason to contend that he had a right to replevy that part of the property that could be found, and to maintain a separate action to recover the value of that which had been thus severed from it. But we have no occasion in this case to decide that question. The defendant, Schuyler C. Bennett, stands upon the maxim, *Nemo debet bis vexari pro una et eadem causa*; and in this action he is a second time sued for a single and indivisible act. As to him, at least, it is an unnecessary multiplication of actions.

In the case of *Farrington v. Payne*, 15 Johns. 432, the court say: "Suppose a trespass of a thousand barrels of flour: would it not be outrageous to allow a separate action for each barrel?" It is difficult to see why a thousand actions could not be maintained in such a case—some in replevin, others in trespass, and others in trover—if the present action can be maintained. In that case, the defendants had taken three bed-quilts and a bed. Judgment had been obtained for the bed-quilts in a former action, and this judgment was held to be a bar to an action for the bed.

In the case of *Bates v. Quattlebom*, 2 Nott & M. 205, it was held that if a party has an entire and indivisible demand and brings an action for a part, he shall not afterwards bring an action for the residue. The judgment in the first action is a bar to the second action.

In *Fetter v. Beale*, 1 Salk. 11, the defendant had committed an assault and battery on the plaintiff, by beating his head upon the ground. The plaintiff obtained a judgment for it. Afterwards a piece of his skull came out, and he brought an action for the further damage. It was held that the first judgment was a bar.

In this case, the plaintiff having obtained a judgment in replevin against Schuyler C. Bennett for a part of the property, and also a judgment for nominal damages, the court are of opinion that he cannot maintain the present action against

Bennett and Hood jointly for further damages for the taking and detention of the whole property, the whole having been restored to him. The principle insisted on by the plaintiff, that an action will lie against each of several co-trespassers, and that the plaintiff may elect *de melioribus damnis*, is not applicable to the present case. The authorities on the point are collected in the note to *Broome v. Wooton*, Yelv. (Am. ed.) 67. They do not decide that after obtaining a judgment in replevin against one trespasser, he may afterwards sue the other for damages. Still less do they decide that he may afterwards maintain a joint action against both.

Exceptions overruled.

LIABILITY OF CO-TRESPASSERS.—This subject is treated in the note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149. Rule *de melioribus damnis*: Id. 145. The principal case is cited to the point that a judgment against one joint trespasser, without satisfaction, does not bar an action against another: *Elliott v. Hayden*, 104 Mass. 182.

FORMER RECOVERY IS BAR TO ACTION FOR SAME INJURY, though the form of action is different in the two cases: *Gilchrist v. Bale*, 34 Am. Dec. 469; *Agness v. McElroy*, 48 Id. 772; *Coffin v. Nott*, 52 Id. 537; *Hoey v. Furman*, 44 Id. 129; *Sheldon v. Carpenter*, 55 Id. 301. And the recovery of a judgment for a part of an entire demand is a bar to a subsequent action for another part of the same demand: *Oliver v. Holt*, 46 Id. 228; *Bendernagle v. Cocks*, 32 Id. 448. Merger by recovery against one joint obligor: *Swydam v. Barber*, 75 Id. 254, and note 258.

THE PRINCIPAL CASE IS CITED to the point that where the plaintiff has an entire and indivisible claim he cannot recover part of it in one action and subsequently maintain another action for the remainder: *Stevens v. Tuile*, 104 Mass. 335; and that the taking by one act of several chattels of the same person will not sustain more than one action: *Folsom v. Clemence*, 119 Id. 474. A judgment against an attorney in an action of contract for the breach of his written agreement, for a sufficient consideration, to discharge a judgment and execution, is a bar to a subsequent action of tort against him to recover further damages for an arrest, by his directions, upon the same execution: *Smith v. Way*, 9 Allen, 473, citing the principal case.

SIMPSON v. CARLETON.

[1 ALLEN, 109.]

CERTIFIED COPIES OF SCHEDULE OF DEBTS AND LIST OF CLAIMS filed in insolvency proceedings are incompetent to show that debtor was insolvent at the time he made an alleged preference.

ADMISSIONS OR REPRESENTATIONS OF VENDOR MADE AFTER OTHER PERSONS HAVE ACQUIRED SEPARATE RIGHTS in the same subject-matter cannot be received to disparage their title. The rights of the vendee and those claiming under him cannot in this way be impaired or affected.

DEPOSITIONS ARE ADMISSIBLE BY FORCE ONLY OF STATUTES under which they are allowed to be taken, and are inadmissible unless there has been a full compliance with the actual and positive requirements of the law.

DEPOSITION IS INADMISSIBLE WHERE CAPTION FAILS TO SET FORTH, after stating that the deponent was sworn to testify the truth, the whole truth, and nothing but the truth, that he was sworn to do so "relating to the cause for which the deposition is taken," as provided by statute.

EVIDENCE SHOWING DEBTOR'S INATTENTION TO BUSINESS AND INDULGENCE IN EXPENSIVE HABITS, and that these facts were known to an alleged fraudulent mortgagee, and evidence of the debtor's general reputation as to insolvency, is admissible in a suit by the assignee in insolvency, against the mortgagee, to recover the value of property taken under the mortgage, to show that the mortgagee had reasonable cause to believe the debtor insolvent.

IN ACTION BY ASSIGNEE IN INSOLVENCY FOR ALLEGED CONVERSION OF DEBTOR'S GOODS by a mortgagee of a part of the goods, who has sold all of the goods, it is not error to admit, as evidence of the conversion of the property claimed, the reply of the mortgagee, to a demand by the assignee for the goods, that "he was sorry that he couldn't accommodate him, and he had been expecting this demand for several days."

IN ACTION BY ASSIGNEE OF INSOLVENT DEBTOR FOR ALLEGED CONVERSION OF GOODS OF DEBTOR by a mortgagee of a portion of the goods, who has sold under the mortgage, besides the mortgaged goods, similar goods of the debtor not included in the mortgage, but intermingled and confused with the mortgaged goods, although the goods were sold and converted into money before any demand was made by the assignee upon the defendant, still, for the purpose of establishing a conversion, it is sufficient to show that the defendant has been in possession of particular parcels of property belonging to the plaintiff, which he has unlawfully converted to his own use by an actual sale and an appropriation of the proceeds to his own benefit, and the plaintiff may recover whatever articles belonging to him he can show have been thus disposed of, and need not show any demand and refusal.

MORTGAGE TO SECURE PRE-EXISTING DEBT IS NOT LESS VOID AS TO CREDITORS, because a mortgage to secure the same debt, executed at the time the debt was contracted, contained a covenant that a new mortgage should be given at a certain future time as additional security for the debt.

TORT for the alleged conversion of a stock of goods claimed to be the property of the plaintiff's insolvent. The defendant sold to one Alexander, on the twelfth of February, 1857, a stock of goods amounting to five thousand eight hundred dollars, and received therefor two thousand dollars cash, and notes for three thousand eight hundred dollars, secured by a mortgage on the property sold. One thousand dollars of this sum became due in six months, and the rest at longer periods. The mortgage contained a covenant that the security should be renewed by a new mortgage every six months upon such goods as should be purchased by Alexander to replenish his stock. Alexander engaged in business, sold the mortgaged

property at retail, and replenished the stock with similar goods bought on credit. On the twelfth of August, the defendant demanded payment of the first note, but Alexander delayed until the seventeenth of September, and then executed a new mortgage of his stock, which consisted partly of old and partly of new stock, bought since the first mortgage, but the amount of each, or the particular articles of each, did not clearly appear. A few months afterwards, Alexander failed to pay his notes, and the defendant took possession of the mortgaged goods, leaving Alexander in charge of them. Soon afterwards, the defendant learned that Alexander had secretly carried away a part of the goods, and when Alexander refused to let him have possession of the remainder, he sued out his writ of replevin, under which the goods were duly seized and appraised at about three thousand nine hundred dollars, and he gave his bond to the officer, and received the goods. The replevin suit was then settled; Alexander releasing the replevin bond, and also the right to redeem the mortgaged goods to the defendant. Afterwards, on the eighth of February, 1858, the creditors of Alexander commenced proceedings in insolvency *in invitum*, and on the twenty-third of April, the plaintiff was duly made assignee. In the months of March and April, the defendant sold the goods, and received the proceeds thereof. On the twenty-first of July following, the plaintiff made a written demand upon the defendant for all the goods taken upon the writ of replevin, and also made an oral demand to substantially the same effect, in reply to which the defendant said that "he was sorry he couldn't accommodate him, and he had been expecting this demand for some days." The plaintiff relied upon this demand and refusal as evidence of conversion. The plaintiff maintained that the mortgage of the seventeenth of September was void as against creditors, and introduced evidence that Alexander was insolvent at the time, and that the defendant had reasonable cause to believe him to be so. He also introduced under objection certified copies of the schedule of debts, and list of claims, and a demand proved in the court of insolvency against Alexander, to show his insolvency. No shedule of assets was produced, and it did not appear that there had been such a schedule, or that any assets ever came into the hands of the assignee. The plaintiff offered the deposition of one Davis taken upon notice. To this the defendant objected, on the ground of the insufficiency of the caption, because it stated merely "that the deponent was sworn to

testify the truth, the whole truth, and nothing but the truth." The objection was overruled. The plaintiff was also allowed to introduce, under objection, evidence of Alexander's extravagant habits, etc.; and was permitted, under objection, to inquire what the general reputation of Alexander was as to solvency in the latter part of the summer, and in September of 1857, in Haverhill. There was evidence tending to show that Alexander had, since the mortgage, bought other goods similar to those mortgaged, and that some of these were in the store at the time of the seizure, under the defendant's writ of replevin; but there was no evidence to identify or distinguish these goods from the mortgaged goods; and the plaintiff claimed that as he had demanded all the goods taken on the writ, the burden was upon the defendant to show what goods of those so taken belonged to him. The defendant asked the court to instruct the jury that if they found that the mortgagee took all the goods in the store under a writ of replevin, and the taking was assented to by the insolvent previous to the insolvency, and the replevin suit was settled, and nothing was done by the assignee to separate or designate any portion of the goods which were not mortgaged, and no demand was made upon the defendant by the assignee to set out or deliver up such goods, but the written and verbal demand for all the goods, such demand and qualified refusal would not be sufficient evidence of the conversion of the goods; and further, if they found that the defendant took the goods under the circumstances above stated, and no demand was made upon him for them until after they were sold and converted into cash, then such demand and qualified refusal would not be sufficient evidence of a conversion. This instruction the court refused, but instructed substantially that if the confusion of goods was such as to make it impossible to distinguish those belonging to the defendant under his first mortgage, and if this uncertainty was due to the imperfect description contained in the first mortgage, the loss must fall upon the defendant; but if the intermixture was not attributable to the defendant, he might lawfully take possession of all the goods, and when applied to by the plaintiff to give up all that did not fall within the first mortgage, the answer, "Take what belongs to you, and I will keep what belongs to me," would not be sufficient evidence of conversion. But if the defendant had sufficient time to select what belonged to him, and had means for making the discrimination which the other party had not, then the appro-

priation of the whole by the defendant to his own use by selling the property, or otherwise, would amount to a conversion of so much of it as did not in fact belong to him. The defendant also requested the court to instruct that if the mortgage of the seventeenth of September was a renewal of the mortgage of February 12th, made in good faith in pursuance of the covenant set forth in that mortgage, and under an agreement made at the time of the sale of the goods, and the contraction of the mortgage debt, that the mortgagor, in consideration that he might have possession of the mortgaged goods to sell by retail, would keep up the stock by new purchase, and in order to keep the security good would renew the mortgage upon his whole stock, then the mortgage of September 17th would not be void, although the mortgagor might have been at that date actually insolvent, and the mortgagee might have had reasonable cause to believe him insolvent, and although it was made within six months before the time of filing the petition against the insolvent. This instruction was refused, and the court charged that the second mortgage was in effect a new security for a pre-existing debt, and if in all other respects liable to impeachment as a fraudulent or prohibited preference, it would be void as against the assignee, notwithstanding the covenant contained in the first mortgage providing in terms for the renewal of the security. Verdict was found for the plaintiff, and the defendant alleged exceptions.

B. F. Butler and N. St. J. Green, for the defendant.

J. A. Gillis and H. Carter, for the plaintiff.

By Court, MERRICK, J. 1. The certified copies of the schedule of debts and list of claims appearing in the proceedings against Alexander in the court of insolvency, which were offered in evidence by the plaintiff, should have been excluded. They were produced to show that Alexander was insolvent at the time when he made sale to Carleton of the goods in controversy, and the plaintiff was permitted to lay them before the jury to establish that fact. But the evidence was incompetent. The statute made it the imperative duty of the debtor to deliver, within three days after the date of a warrant issued against him in insolvency, to the messenger, a schedule containing a full and true account of all his creditors: Stat. 1838, c. 163, sec. 6; Gen. Stats., c. 118, sec. 20. The schedule of debts is therefore nothing but a statement or declaration of the debtor; and the copies which were permitted to be given in

evidence were in reality only proofs of what was said by Alexander long after the sale to Carleton. But admissions or representations of a vendor, made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title. He cannot in that way impair or affect the rights of his vendee or of those claiming under him. This is a familiar and elementary principle. It was early recognized by this court, and has ever since been acted upon as an established and unquestioned rule in the law of evidence: *Bartlet v. Delprat*, 4 Mass. 702; *Bridge v. Eggleston*, 14 Id. 245 [7 Am. Dec. 209]; *Doe v. Webber*, 1 Ad. & EL 733; 1 Greenl. Ev., sec. 180, and notes.

These copies were undoubtedly admitted in evidence, as was suggested by counsel at the argument, upon the authority of the reported decision in the case of *Heywood v. Reed*, 4 Gray, 574. It is there said that the proceedings in insolvency, which were received in that case, were rightly admitted for the purpose for which they were offered, which, upon recurring to the report, is seen to have been to show the fact and the extent of the insolvency of Noyes, by whom it was alleged a sale of goods had been made in fraud of his creditors. That being the purpose for which the proceedings in insolvency were produced, the remark made by the court on the subject is obviously incorrect, and must have been induced by a misapprehension of the facts in reference to which it was made. It will be seen, upon recurring to the statement of facts in that case, and to the points of law which were raised and considered, that the attention of the court was attracted chiefly to other questions upon which the decision which was made, sustaining the exceptions, depended, and which must have been exactly the same, whatever had been the determination respecting the admissibility in evidence of the schedule and proof of debts. Undoubtedly it was only intended, by what was said on the subject, to recognize and sustain the rule affirmed in the case of *Holbrook v. Jackson*, 7 Cush. 136, which was cited by counsel as having a bearing upon the question under consideration. But, at any rate, the general proposition, as stated in the former case, is untenable; and the record of proceedings against parties in insolvency can be considered competent evidence upon an issue like that in the present case, only for the limited purpose for which in *Holbrook v. Jackson*, *supra*, it was held to be admissible.

2. The testimony of witnesses, in the form of depositions, is

admissible in evidence, upon the trial of issues in courts of law, by force only of statutes under which they are allowed to be taken. It cannot be received, therefore, in that form, unless there has been a full compliance with the actual and positive requirements of the law: *Bradstreet v. Baldwin*, 11 Mass. 229; *Welles v. Fish*, 3 Pick. 74; *Davis v. Allen*, 14 Id. 313. Our statute provides that a deponent shall be sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause for which the deposition is taken; and it is made the duty of the magistrate to annex to it his certificate, among other things, of the time and manner in which it is taken: Gen. Stats., c. 131, secs. 23, 26. It appears, from the certificate annexed to the deposition of Davis, which was allowed to be given in evidence against the objection of the defendant, that the deponent was sworn generally to testify the truth and the whole truth, but not particularly to that relating to the cause for which the deposition was taken. The positive requirement of the law in this respect was not therefore observed; and the party for whose benefit it was taken, not having been careful to have the provisions of the statute strictly complied with, is not entitled to avail himself of it in evidence. It is certainly a suitable and reasonable precaution to concentrate the attention of the witness, by the form of the oath administered to him, to the particular matters respecting which he is called upon to testify; and in making provisions upon the subject, it may have been thought necessary, in view of the established forms of proceedings in criminal cases, and especially in prosecutions for perjury, that the oath should be administered in the very words in which the statute is expressed. But without seeking for the reason why it is so prescribed, it is sufficient that the statute is peremptory and unambiguous in its terms. It is the duty of the court to administer the law just as it is ordained by the legislature. A rule established in clear and explicit language by its authority cannot be disregarded or relaxed, but must in all cases be conformed to and enforced. The caption annexed by the magistrate to the deposition of Davis fails to show that the prescribed rule was complied with, and therefore it cannot be considered to have been regularly taken.

This same question has arisen in the courts in the states of Maine and New Hampshire, upon statutes very similar to our own; and it has there been determined that when it does not appear in the certificate of the magistrate that the deponent was sworn to testify the truth "relative to the cause for which

it is taken," his deposition cannot be admitted in evidence, because it is not shown to have been taken in due observance of the positive requirements of law upon the subject: *Fabyan v. Adams*, 15 N. H. 371; *Brighton v. Walker*, 35 Me. 132; *Parsons v. Huff*, 38 Id. 137. Upon authority, therefore, as well as upon the conclusions to be deduced from the particular provisions of the statute, it is apparent that the deposition of Davis should have been excluded, because it was unaccompanied by proof that his testimony was given under oath administered in the form prescribed by law.

3. In other respects, the rulings and instructions of the court appear to have been unobjectionable. Certainly the evidence offered to show the inattention of Alexander to his business, his indulgence in habits and practices of great and unnecessary expense, and the wasting of his time in useless and frivolous pursuits, and that all this was known to Carleton, had some tendency to show that he had reasonable cause to believe that his debtor could not have been, and was not, solvent at the time of the sale of the goods, the value of which is in controversy; because all experience shows that such courses as he is said to have indulged in are commonly, if not inevitably, destined to end in failure and bankruptcy. It is perfectly well known to all persons in any degree conversant with the transaction of business, that the conduct of a party and his habits, whether of frugality or of extravagance in his expenditures, are among the first things which men of ordinary care and prudence usually consider in forming a judgment respecting his pecuniary credit and responsibility. And accordingly, evidence of such facts, upon the trial of an issue like that in the present case, has been held competent and proper to be submitted to the jury: *Bartlett v. Decreet*, 4 Gray, 113; *Heywood v. Reed*, Id. 574. And on the same ground, the questions respecting the general reputation of Alexander, in relation to his pecuniary credit and standing, were under the circumstances, otherwise shown, properly allowed to be proposed to and answered by the witnesses.

4. The written and verbal demands upon the defendant, and the reply which he made to them, were properly admitted in evidence for the purpose of proving conversion of the property claimed. His answer was indirect and evasive; but the meaning of it was to be ascertained and acted upon by the jury, who could scarcely, we think, have misunderstood or been misled by it. Besides, the sale of the goods, which appears to have

been fully and satisfactorily proved, was of itself a conversion of such as belonged to the plaintiff; and therefore, with respect to them, no proof of demand and refusal was necessary to enable him to maintain his action.

5. Upon examining the bill of exceptions, we do not perceive that any occasion arose at the trial for the application of the instructions desired by the defendant in reference to the intermixture of goods, and the rights and duties of the respective parties in consequence of it. All the goods appear to have been sold and converted into money before any demand was made upon him by the assignee. This being so, neither of the parties could be called upon or required to designate and separate from the general stock the articles not enumerated or included in the description in the first mortgage, which were conveyed by the second. In such case, it would be sufficient to show that the defendant had been in possession of particular parcels of property belonging to the plaintiff, which he had unlawfully converted to his own use, by an actual sale and an appropriation of the proceeds to his own benefit. The plaintiff would therefore be entitled to recover for whatever articles belonging to himself he could show had thus been disposed of. In this view of the facts reported, it seems unnecessary to consider in detail the instructions which were actually given, although, as we understand them, they appear to have been correct; because we cannot foresee what particular rule in reference to the facts to be disclosed upon the new trial, which for other reasons must be granted, ought to be prescribed to secure its regularity and make it effectual in deciding the matters in controversy.

6. The instructions asked for by the defendant, in reference to the legal effect of the mortgage of the seventeenth of September, and the rights of the parties under it, were properly withheld, and those which were given upon the subject were correct. The mortgage of September seventeenth certainly was not a renewal of that of the twelfth of February, inasmuch as the property conveyed by the one was not identical with that conveyed by the other. The latter created new rights, and was intended to give, and if valid actually did give, to the mortgagee a new security for his pre-existing debt, by creating a lien upon property of which, when the former was executed, the mortgagor was not the owner. The validity of this latter conveyance is to be determined upon the circumstances under which it was made. If the mortgagor was then in fact insol-

vent, and the mortgagee had reasonable cause to believe that he was in that condition, the conveyance was an attempt unlawfully to prefer one of his creditors to the disadvantage of the others; and as against them was therefore fraudulent, unlawful, and void. The agreement made by the parties on the twelfth of February, and expressed in the covenants of the deed of that date, that the mortgagor should, at the expiration of every six months, make a new mortgage, and embrace in it all the goods and merchandise of which his stock should then consist, including whatever he had in the mean time purchased or in any manner become entitled to, was a mere executory contract. The right of giving new security under such contract is said by the court, in the case of *Blodgett v. Hildreth*, 11 Cush. 818, to be plainly excluded by the provision in the insolvent act that "any security given for the performance of any contract, when the agreement for such security is part of the original contract, and the security is given at the time of making such contract," shall not be deemed to be a preference: Stat. 1838, c. 163, sec. 10. To render it effectual, not only must the agreement be made, but the security must be given, contemporaneously with the original contract; if given afterwards, its validity is to be tried by the same tests which are in general to be applied to all sales and conveyances made by a debtor for the benefit of a pre-existing creditor. This is the principle which was embraced in the instructions given to the jury instead of those asked for by the defendant. In each particular, therefore, the ruling of the court was unobjectionable.

But because the deposition of Davis, and copies of the schedule of debts, and proof of claims in the insolvency proceedings against Alexander, were erroneously admitted in evidence, the exceptions must be sustained, and a new trial granted.

DOCTRINE OF CONFUSION OF GOODS: See *Robinson v. Holt*, 75 Am. Dec. 233, and note 237, citing prior cases.

DEPOSITION IS INADMISSIBLE AGAINST OBJECTION, WHEN IT DOES NOT APPEAR THAT REQUISITES OF STATUTE have been substantially complied with: *Wilson v. Campbell*, 70 Am. Dec. 586; *Avery v. Avery*, 62 Id. 513, note 518. A deposition is incompetent when the words "before me," in the caption preceding the name of the magistrate before whom the deposition purported to be taken, are omitted: *Powers v. Shepard*, 53 Id. 168. The principal case is cited in the following cases: Depositions are evidence only when all the requirements of the statute have been complied with: *Simpson v. Dix*, 131 Mass. 185; *Cunningham v. Hall*, 4 Allen, 277. They must show that the oath was administered in the manner prescribed by the statute: *Cunningham v. Hall*, *supra*;

Bacon v. Rogers, 8 Id. 146. And a deposition is inadmissible when it does not appear from the magistrate's certificate that the witness was sworn to testify the truth "relative to the cause for which it was taken:" *Hitchings v. Ellis*, 1 Id. 475; *Burt v. Allen*, 103 Mass. 42. But if the magistrate's certificate upon a deposition shows that the deponent was sworn to testify, etc., in relation to an action pending between A and B, the judge may allow it to be read in evidence on the trial of an action bearing that title, although it appears that another action with the same title is pending in the same court: *Hale v. Siloway*, 3 Allen, 359, distinguishing the principal case on the ground that the magistrate's certificate omitted no statutory requisites.

DECLARATIONS OF GRANTOR AS TO FRAUD IN CONVEYANCE ARE ADMISSIBLE WHEN: See *McDowell v. Goldsmith*, 61 Am. Dec. 305, and cases cited in the note 317; *Covanhovan v. Hart*, 60 Id. 57. In an action of replevin against B to obtain goods sold by the plaintiff to A, and by him to B, if the plaintiff seeks to rescind the sale on the ground of fraud on the part of A, evidence that A filed a petition in bankruptcy after the sale to B, and that he was adjudicated a bankrupt thereon, is inadmissible: *Haskins v. Warren*, 115 Mass. 539, citing the principal case. But where the assignees of the bankrupt are the defendants, the plaintiff may introduce the schedules filed in bankruptcy by the bankrupt, for the purpose of proving his insolvency at the time he filed them, if that fact is admissible, and the principal case is not conflicting, for it is proper that such schedules should not be admitted where the insolvent or his assignees are plaintiffs, and as in the principal case in disparagement of the title of his vendee; but in a suit against him or his assignee, his admissions and declarations may be properly admitted in favor of the plaintiff: *Hoemer v. Oldham*, 122 Id. 552.

CONDUCT OF PARTIES TO SALE BEFORE AND AFTER, as well as at the time of, the sale, may be inquired into for the purpose of ascertaining whether or not such sale was *bona fide*: *Reels v. Knight*, 19 Am. Dec. 184. So, of the pecuniary condition of the parties: *Covanhovan v. Hart*, 60 Id. 57. The principal case is cited to the point that the validity as to creditors of a mortgage given for a pre-existing debt depends entirely upon the circumstances under which it was made, and the state of things existing at that time: *Forbes v. Howe*, 102 Mass. 435; and that evidence that at the time of the mortgage of a stock of goods the mortgagee knew that the mortgagor was intemperate in his habits, and neglected his business, is competent in support of the allegation that the mortgage was made and received in fraud of the insolvent law: *Alden v. Marsh*, 97 Id. 163.

BURTON v. SCHERPF.

[1 ALLEN, 123.]

SALE OF TICKET OF ADMISSION TO CONCERT IS MERE REVOCABLE LICENSE to enter hall and remain during the concert, and if revoked after the entrance of the purchaser, and he refuses to depart upon request, he becomes a trespasser, and may be removed by such force as is necessary to overcome his resistance; and for such removal trespass will not lie, his only remedy being an action for the breach of contract.

TORT for assault and battery. The evidence showed that in 1857 one Thalberg gave a concert in a public hall in Lowell.

No restriction as to persons to be admitted was made in the advertisement of the concert, and it was stated therein that in order to bring the entertainment within the reach of all classes, the admission fee would be fifty cents. The plaintiff, who was a colored man, entered the building and bought a ticket at the ticket-office. He then went to the outside door of the hall, delivered his ticket to the door-keeper, received from him a programme of the concert, and entered the hall. He was proceeding towards seats which were about ten feet from the door, when he was called back by the defendant, who said to him, "You cannot go in here; we don't allow black men in here." After further conversation, during which the defendant ordered the plaintiff to go out, and he refused to go, the defendant took hold of the plaintiff, and forcibly put him outside of the hall, in the presence of the audience, and at the ticket-office tendered him the amount he had paid for his ticket. It was not claimed that the defendant used any more force than was necessary to put the plaintiff out, though the plaintiff's coat was torn. The court was requested by the defendant to rule that the plaintiff could not maintain this action of tort, and that the action should have been for breach of contract. The court ruled that the plaintiff could recover in this form of action. A verdict was rendered for the plaintiff, and the defendant alleged exceptions.

T. H. Sweetser, for the defendant.

B. F. Butler, for the plaintiff.

By Court, MERRICK, J. The sale of the ticket to the plaintiff, under the circumstances stated in the bill of exceptions, was a license to him to enter the hall of the building in possession of the defendant as its temporary lessee, and to remain in it during the concert which was to be given there. But the license was revoked immediately upon the entrance of the plaintiff into the hall and before he had taken his seat. By remaining there afterwards, and refusing to depart upon request, he became a trespasser; and the defendant had a right to remove him by the use of such degree of force as his resistance should render necessary for that purpose. It is not alleged that in the exercise of this right the force used was at all excessive, or more than was requisite to effect his removal in a reasonable manner from the premises.

A parol license by the owner of real estate to enter or do any particular act upon it may commonly be revoked at any time

before the object and purpose for which it was conceded has been fully availed of, or wholly accomplished: *Ruggles v. Lesure*, 24 Pick. 187; *Hewlins v. Shippam*, 5 Barn. & Cress. 221. This general proposition is not contested by the plaintiff; but he claims that, as the contract under which his license was derived was either wholly or in part executed, and as he was in the actual enjoyment of the privilege conferred upon him at the time when the defendant undertook to revoke it, the right of revocation was lost, and could no longer be asserted. This claim is founded upon the clear and well-recognized distinction between a mere license, which neither passes any interest nor alters or transfers property in anything, but only makes an action lawful which would otherwise have been unlawful, and a license coupled with a grant, or arising from a sale of property to be taken and carried from the land where it is situated or upon which it is placed: *Thomas v. Sorrell*, Vaughan, 830. In the latter case, it is irrevocable so far as the contract is executed. Thus, where the parties entered into an oral contract that the defendant should cut certain trees upon the plaintiff's land, peel them, and take the bark to his own use, and pay therefor a certain price per cord, and in pursuance of the contract the defendant entered upon the land, cut the trees, and peeled them, it was held that the plaintiff could not revoke the license nor prevent the defendant from taking away the bark, and that his entry upon the land for the purpose of taking and carrying away the bark, after he had been forbidden to do so, was not a trespass, but a lawful and justifiable act: *Nettleton v. Sikes*, 8 Met. 34; *Clafin v. Carpenter*, 4 Id. 580 [38 Am. Dec. 381].

So where the plaintiff sold certain standing trees upon his land to the defendant for a price agreed upon, and he thereupon entered and cut down a part of them, and before any of them were taken away he was forbidden by the plaintiff to proceed any further in the execution of the contract, or to remove any of the trees which had been severed from the freehold, and he did, nevertheless, go upon the land and take away such of the trees as he had previously cut down, it was determined that although the plaintiff had a right to terminate the contract and revoke the license as to the trees left standing, he could not do so as to those which had already been cut down, and that an action of trespass against the defendant for subsequently entering upon the land and carrying away such trees could not be maintained: *Giles v. Simonds*

15 Gray, 441 [77 Am. Dec. 373]. But in another case, bearing in all the facts reported a close resemblance to those disclosed in the present action, where it appeared that a ticket of admission to the grand-stand, within the inclosure of the Doncaster races, was sold to the plaintiff, and he afterwards, upon surrendering his ticket, was permitted to enter upon the grounds within the inclosure, and that the license to him was then revoked, and upon his refusal to depart upon request, he was forcibly removed from the premises, it was determined, after much consideration, that upon these facts his removal was justifiable, because the defendant had a right to countermand the license, and the plaintiff by remaining there afterwards was acting in an unlawful manner; and therefore that an action for an alleged assault and battery committed upon his person in putting him out of the inclosure could not be maintained: *Wood v. Leadbitter*, 13 Mee. & W. 845.

A like determination was made in this court in the recent case of *McCrea v. Marsh*, 12 Gray, 211 [71 Am. Dec. 745]. McCrea purchased a ticket of Marsh, admitting him to the family circle in the Howard Athenæum, to witness a theatrical performance advertised to be performed there. The ticket was purchased at the ticket-office, and the plaintiff proceeded with it to the entrance of the theater, and exhibiting his ticket to the door-keeper, demanded admission. But the door-keeper refused to allow him to enter, for the reason that the plaintiff was a colored person, and that such persons were not admitted to seats in the family circle. The defendant being sent for, and informed of what had taken place, ordered that McCrea should not be allowed to enter, and upon his attempting to do so, he was forcibly resisted and removed from the building. For this assault upon him, he commenced his action; and it was held by the court, that by the purchase of the ticket he acquired a mere license to enter the theater and witness the performance; but that the license was revocable; and being revoked, he was himself a trespasser in attempting to enter that part of the building from which he was excluded by the proprietor; that he was thereupon lawfully removed, and could maintain no action for the assault of which he complained. These determinations completely cover the present case, and are decisive of it. The plaintiff had a mere license; it was revocable, and revoked; and upon his refusal to leave the hall to which his ticket gave him admittance, the defendant had a lawful right to remove him. For such removal, an action of trespass cannot,

upon the facts reported, be maintained. He may have a remedy in another form of action for breach of the contract, but that cannot affect the decision of the present case. The ruling which the defendant desired of the court would have been a correct statement of the law, and should have been given. The refusal to adopt it was erroneous, and the exception taken for that cause must be sustained.

UNEXERCISED PAROL LICENSES ARE GENERALLY REVOCABLE, even when based upon a valuable consideration; but when the licensee has acted upon the license, it may not be revoked to his damage: *Rhodes v. Otis*, 73 Am. Dec. 439, note 448; *Dame v. Dame*, 75 Id. 195; *Wickersham v. Orr*, 74 Id. 348.

THE PRINCIPAL CASE IS CITED to the point that portions of realty, capable of severance, may be sold by oral agreement, and removed by virtue of an oral license, but before the severance the owner may revoke the sale and license: *Poor v. Oakman*, 104 Mass. 316; *Owens v. Lewis*, 46 Ind. 503; and that if the owner of land, for a valuable consideration, orally licenses another to cut off, within a certain time, the trees standing upon it, and afterwards executes an absolute deed of the land to a third person, such deed, when made known to the licensee, will operate as a revocation of the license, although the grantee had knowledge of it: *Drake v. Wells*, 11 Allen, 144. In *Solier v. Trinity Church*, 109 Mass. 23, the principal case was cited to the point that the owners of tombs, in a church building, hold mere revocable licenses, but it was unnecessary to decide the point.

THEATER TICKET IS REVOCABLE LICENSE: *McOrea v. Marsh*, 71 Am. Dec. 745, and note treating the subject 747, 748.

BUTTRICK v. CITY OF LOWELL.

[1 ALLEN, 172.]

CITY IS NOT LIABLE FOR ASSAULT AND BATTERY COMMITTED BY POLICE OFFICERS in an attempt to enforce a city ordinance. Police officers are public officers, and not the agents or servants of the city.

CITY DOES NOT BECOME LIABLE FOR ASSAULT AND BATTERY COMMITTED BY ITS POLICE OFFICERS in enforcing a city ordinance, because it authorizes its solicitor to appear and defend a suit against the police officers. This does not constitute a ratification and adoption of the acts of the officers.

TORT for assault and battery. The following facts were agreed upon in the superior court, so far as they should be competent evidence: Colburn and Stacy were watchmen and police officers of the city of Lowell, with the powers of constables, except the service of civil precepts. About sunset one day, while the plaintiff was standing peaceably upon the sidewalk and talking with one other person, interrupting no one in the use of the sidewalk, the officers ordered him off; and when he refused to go, they assaulted, arrested, and impris-

oned him, claiming that they were merely performing their official duty. The plaintiff then brought an action of tort against the officers for false arrest and assault and battery, and obtained a judgment for five hundred dollars damages, and costs. This judgment had not been satisfied. The city of Lowell authorized its solicitor to appear and defend the case, and paid him for trying the case. The city solicitor, in pursuance of a city ordinance, made a report of all cases in which the city was a party or interested, and this report was accepted by the city council. The report contained the following statement of the plaintiff's action against the police officers: "Samuel P. Buttrick v. City of Lowell. This action was entered December term, 1855, by Butler & Webster, esquires, and was to recover damages for an alleged trespass in removing the plaintiff from the sidewalk on Merrimack street, and imprisoning him. The removal of the plaintiff from the sidewalk, and the imprisonment, were justified by the defendants in their defense under the city ordinance which provides that 'three or more persons shall not stand together or near each other in any street in the city, in such manner as to obstruct a free passage therein for passengers.' The cause came to trial in March last; and although the evidence tended to show that the plaintiff was in the first instance in fault in refusing to move along, as requested by one of the officers, it was proved that one of the defendants used violence in imprisoning the plaintiff, and therefore the jury returned a verdict for the plaintiff of five hundred dollars." It was admitted that the defendants in that action made the defense stated in the report, and so claimed their justification at the time of the arrest. Nonsuit was ordered on these facts, and the plaintiff appealed.

B. F. Butler, for the plaintiff.

T. H. Sweetser, for the defendant.

By Court, BIGELOW, C. J. This case must be governed by the decisions in *Hafford v. City of New Bedford*, 16 Gray, 297, and *Walcott v. Swampscott*, 1 Allen, 101. Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the pub-

lic peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties, the city or town cannot be held liable.

Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city.

The facts relied on in this case to show a ratification or adoption by the city of the acts of the police officers cannot have that effect. They are entirely consistent with a belief on the part of the mayor and other agents of the city that the police officers had committed no unlawful invasion of the plaintiff's rights: *Perley v. Georgetown*, 7 Gray, 464.

It may be added that, if the plaintiff could maintain his position that police officers are so far agents or servants of the city that the maxim *respondeat superior* would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action; because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.

Judgment for the defendants.

LIABILITY OF MUNICIPAL CORPORATION FOR ACTS OF OFFICERS whose duties are of a public nature: *Dargan v. Mayor etc. of Mobile*, 70 Am. Dec. 505, note 511. The principal case is cited to the point that a city is not liable for the neglect of its marshal, its police officers or firemen, appointed by it: *Faulkner v. City of Aurora*, 85 Ind. 135; *Western College etc. v. City of Cleveland*, 12 Ohio St. 379; that a police officer is not a servant of the city which appoints him, in any such sense as to take away his right of action against it for an injury sustained by reason of a defective highway: *Kimball v. City of Boston*, 1 Allen, 417; that a city is not liable for a personal injury resulting from the negligence of officers and members of its fire department in performing their duties: *Fisher v. City of Boston*, 104 Mass. 95; that though elected by the city, assessors and tax-collectors are public officers, having their duties prescribed by law for the general welfare, and are guided by the law in the

exercise of these duties: *Rossire v. City of Boston*, 4 Allen, 58; that an action cannot be maintained by the collector of taxes against the town for issuing of a warrant of distress against him, and the levying the same on his goods, by the treasurer of the town, the issuing and enforcement of the same being the act of the town treasurer on his own responsibility: *Snow v. Brunswick*, 71 Me. 582; that a constable and deputy collector, in serving a warrant for the collection of taxes, is a public officer, and not a servant of the city: *Dumber v. City of Boston*, 112 Mass. 75; and that overseers of the poor are public officers, and not agents of the town: *New Bedford v. Taunton*, 9 Allen, 209.

GAHAGAN v. BOSTON AND LOWELL RAILROAD CO.

[1 ALLEN, 187.]

WHERE IN ACTION AGAINST RAILROAD COMPANY FOR INJURY RECEIVED IN PASSING ALONG HIGHWAY an issue is made upon the unreasonable or negligent conduct of the company in the use of the highway at the time of the accident, the habits of the company at other times has no legitimate bearing upon this issue, and evidence respecting such habits is properly excluded.

WHERE PLAINTIFF ATTEMPTS TO PROVE THAT FLAGMAN EMPLOYED BY RAILROAD COMPANY was intemperate and incompetent person, the company may show that he was careful, attentive, and temperate, and this may be proved by witnesses who had seen his conduct, and it is not necessary that they be experts.

RAILROAD COMPANY HAS NO RIGHT TO USE HIGHWAY AS PART OF FREIGHT-YARD, but it may pass and repass upon the highway for any lawful purpose, provided it uses it only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it.

PLAINTIFF MUST SHOW BY AFFIRMATIVE EVIDENCE THAT HE WAS IN USE OF DUE CARE, and upon this point he has the burden of proof.

WHERE WHOLE EVIDENCE ON WHICH PLAINTIFF'S CASE RESTS SHOWS THAT HE WAS CARELESS, and he offers no evidence that he was in the exercise of care, the court may instruct that as a matter of law the action cannot be maintained; and an attempt to pass between cars in motion, propelled by an engine, where no reason appears to justify the attempt, is a case within this rule.

TORT for an injury causing the death of the plaintiff's intestate, who, while passing along a highway, was crushed between the cars of the defendant. Verdict was for the defendants, and the plaintiff alleged exceptions. The case is sufficiently stated in the opinion.

B. F. Butler and N. St. J. Green, for the plaintiff.

J. G. Abbott, for the defendants.

By Court, HOAR, J. The exceptions show that a principal issue in the cause was upon the unreasonable or negligent con-

duct of the defendants in the use of the highway at the time the plaintiff's intestate received the injury for which she seeks to recover compensation. We think their habits at other times had no legitimate bearing upon this issue, and that evidence respecting such habits was properly excluded. If their use of the highway, at that time, was reasonable and lawful, the plaintiff could have no greater rights because on other occasions they had been guilty of misconduct: *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray, 92. They could not have shown their general carefulness as an excuse for their conduct at the time in question: *Tenney v. Tuttle*, 1 Allen, 185. The cases cited by the plaintiff depend upon a different principle, where the acts proved might fairly be regarded as designed to be a preparation for, or commencement of, the principal fact to be established: *Commonwealth v. Merriam*, 14 Pick. 518 [25 Am. Dec. 420].

2. The plaintiff's evidence was not as to the conduct or condition of the flagman at the time of the accident, but was offered to prove that the defendants were negligent in employing an intemperate and incompetent person. This raised directly the question as to his general habits and behavior, and it was therefore right to allow the defendants to show that he was careful, attentive, and temperate: *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray, 92. This was a fact which could be proved by witnesses who had seen his conduct, and could testify to the facts which they had observed. It did not require that they should be experts.

3. It was undoubtedly true that the defendants could not lawfully use the highway as a part of their freight-yard; that is to say, they had no right to make the exclusive use of it which their own convenience required, which they could make of their own property. But they could pass and repass upon the highway for any lawful purpose, provided they used it only to a reasonable extent, and in a reasonable manner, without encroaching upon the rights of others who had an equal right to use it. The question of the mode and reasonableness of this use was rightly submitted to the jury.

4. The question whether the plaintiff's intestate exercised due care, or by his own carelessness contributed to the injury which he received, was a question of fact for the jury, if there were any facts in dispute, or if there were any evidence upon which it was competent for the jury to find that he used ordinary care. But it has long been settled in this commonwealth

that it is incumbent upon the plaintiff to show, by affirmative evidence, that he was in the use of due care; and upon this point he has the burden of proof: *Adams v. Carlisle*, 21 Pick. 146. When, therefore, a plaintiff offers no evidence that he was in the exercise of care, but on the contrary, the whole evidence on which his case rests shows that he was careless, we have held that the court may rightfully instruct the jury as a matter of law that the action cannot be maintained: *Lucas v. Taunton and New Bedford R. R.*, 6 Gray, 64 [66 Am. Dec. 406]; *Gilman v. Deerfield*, 15 Id. 577; *Gavett v. Manchester and Lawrence R. R.*, 16 Id. 501 [77 Am. Dec. 422].

We are of opinion that the conduct of the plaintiff's intestate, as reported, brings his case clearly within this rule; no reason whatever appearing to justify him in attempting to pass between cars in motion, propelled by an engine. The plaintiff's counsel argues that, to sustain the ruling at the trial, it must appear to the court that, under no possible combination of circumstances, it could have been possible for him to make the attempt without negligence. But we do not so understand the effect of the exceptions. The ruling of the presiding judge at the trial was upon the case presented. If the evidence which the plaintiff offered was simply of such conduct on the part of the person injured as is described in the hypothetical case put to the jury in the instructions of the judge, we can have no doubt that it did not, as a matter of law, tend to show ordinary care on his part. If there were any other facts or circumstances in evidence tending to qualify or control the effect of this, they should have been stated in the bill of exceptions.

Judgment on the verdict.

CONTRIBUTORY NEGLIGENCE AS BAR TO RECOVERY AND BURDEN OF PROOF WITH RESPECT THERETO: See *Johnson v. Hudson River R. R. Co.*, 75 Am. Dec. 375, and note 383; *Chapman v. New Haven R. R. Co.*, Id. 344, note 346; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406, and note 410. The principal case is cited in the following cases: Where the whole evidence on which the plaintiff's case rests shows that he was careless, the court may rightfully instruct as a matter of law that the action cannot be maintained: *Wright v. Malden etc. R. R. Co.*, 4 Allen, 289; *Warren v. Fitchburg R. R. Co.*, 8 Id. 230; *Mays v. Boston etc. R. R.*, 104 Mass. 142. Thus a traveler in a railroad car cannot recover against the company for a personal injury suffered wholly or in part by reason of allowing his arm or elbow to be outside of the window, and it is the duty of the court so to instruct: *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 22. And when the circumstances are not complicated, and the undisputed evidence discloses conduct which would be condemned as careless by men of common prudence, it is the duty of the judge to instruct the jury to find :

verdict for the defendant: *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 352. When, however, the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is the duty of the judge to submit the question to the jury: *Gaynor v. Old Colony etc. R. R. Co.*, 100 Id. 212. So it is proper for a judge to refuse to instruct that the plaintiff was not in the exercise of due care, if the facts on which the question depends are in dispute: *Brooks v. Inhabitants of Somerville*, 106 Id. 275; and if there is any evidence from which reasonable care may be inferred, the matter must be left to the jury: *Mayo v. Boston etc. R. R.*, *supra*. And the evidence should be submitted to the jury where the plaintiff did not appear to have been in the position of one who, at his own risk, voluntarily assumes an exposed position not intended for passengers: *Treat v. Boston etc. R. R. Corp.*, 131 Id. 372. Thus the court cannot say, on a bill of exceptions, that riding upon the outside platform of a horse-car is such want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom: *Meesel v. Lynn and B. R. R. Co.*, 8 Allen, 235, citing the principal case as one of those cases where the plaintiff's evidence may be held to be insufficient in law to establish the fact that he exercised ordinary care. So if it is the duty of a servant of a railroad company to uncouple the cars of a train, and this cannot easily be done while the train is still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars and meets with an injury which is caused by a want of repair of the road-bed of the railroad, the court cannot rule as a matter of law that he was careless, but should submit the question to the jury, although he continued in the employ of the company after he knew of the defect: *Snow v. Housatonic R. R. Co.*, Id. 448.

EVIDENCE OF PREVIOUS HABITS AND CONDUCT OF PERSON IN CHARGE OF TRAIN at the time of the accident is admissible to show that his alleged misconduct at that time was in keeping with his general character: *Vicksburg etc. R. R. Co. v. Patton*, 66 Am. Dec. 552, note 574. The principal case is cited to the point that for the purpose of showing culpable negligence on the part of a railroad company in the employment of servants, it may be shown that such employees have been guilty of specific acts of carelessness, unskillfulness, and incompetency, and that such acts were known to the officers of the company prior to the employment of such agents, or that such employees have been retained in such service after notice of such acts: *Pittsburgh etc. R'y Co. v. Ruby*, 38 Ind. 318; *City of Delphi v. Lowery*, 74 Id. 525.

CHARACTER OF PRECISE ACT OR OMISSION OF DEFENDANT, and not the character of the defendant for care, determines whether there has been actionable negligence on his part: *McDonald v. Savoy*, 110 Mass. 50, citing the principal case.

WHITNEY v. LEE.

[1 ALLEN, 193.]

WAY APPURTENANT TO CLOSE IS APPURTENANT TO EVERY PARCEL into which it may be divided.

TORT for obstructions to a right of way. There were three cases between the same parties, and the following facts were agreed: The original grantor under whom both parties claimed

conveyed to a third person the whole of lot No. 43, on Monument square, Charlestown, with the right to use a certain private passage-way over the adjoining lots, Nos. 42 and 41, to Chestnut street. The plaintiff afterwards, by mesne conveyances, became the owner of that part of lot No. 43 which abutted upon the end of the passage-way. The defendant became the owner of lots 42 and 41, by deeds, which included in their description that portion of the way which bounded on the lots, and caused a building to be erected and maintained upon the same and across the way claimed by the plaintiff. After the plaintiff became the owner of the said land, and before the commencement of his actions, he requested the defendant to remove the building, so that he could use the way, which the defendant declined to do. Judgment was rendered for the plaintiff, with one dollar damages, and the defendant appealed.

G. W. Warren, for the defendant.

C. Robinson, jun., for the plaintiff.

By Court, CHAPMAN, J. As these cases came before the court upon an agreed statement of facts, the questions argued for the defendant in respect to the pleadings are immaterial, for the agreement supersedes such questions. The plaintiff's close is part of a larger one, to which the way in question was made appurtenant by the deeds under which the parties hold their respective titles. A way appurtenant to a close is appurtenant to every parcel into which the close may be divided: *Underwood v. Carney*, 1 Cush. 285.

The plaintiff's close is that part of the original one to which the way leads, and is the only part in connection with which it can now be used. As the defendant has obstructed it, judgment must be rendered for the plaintiff; the damages to be nominal.

RIGHT OF WAY APPURTENANT TO PARCEL OF LAND is appurtenant to each of the several lots into which the parcel may be divided: *Fox v. Union Sugar Refinery*, 109 Mass. 298, citing the principal case. Upon this point, see *Hills v. Miller*, 24 Am. Dec. 218, note 222; *Carlin v. Paul*, 47 Id. 139, note 141. The principal case is also cited to the point that, under a declaration setting forth an obstruction of a way appurtenant to a close, damages may be recovered, if the way is appurtenant to any part of the close: *Pettingill v. Porter*, 3 Allen, 354.

BOSTON AND LOWELL RAILROAD Co. v. PROCTOR.

[1 ALLEN, 257.]

RAILROAD PASSENGER TICKET, DATED AND HAVING WORDS "GOOD ONLY TWO DAYS AFTER DATE" stamped upon its face, is not valid after the expiration of the two days, and the railroad company may recover its usual fare.

CONTRACT to recover seventy-five cents for carrying the defendant from Lowell to Boston. The following facts were agreed: The defendant, while traveling from Lowell to Boston on the cars of the plaintiffs, March 21, 1860, tendered to the conductor a ticket issued by the Vermont Central Railroad Company, dated March 16, 1860, upon which were printed as a part of the ticket the words, "Good for this trip only," and upon the face of which were stamped in red ink the words, "Good only two days after date." The conductor refused to receive this ticket because the time named had expired. During that month of March, there was an arrangement between the plaintiff and the Vermont Central Railroad Company and intermediate companies, under which each was allowed to sell through-tickets over the continuous line of road owned by the various companies, each company being bound to carry over its line persons holding such tickets, if the same were presented within the times limited thereon. On March 16th, the defendant bought, at a station of the Vermont Central, a pass through to Boston, which consisted of four tickets, each good for a part of the distance, and one of which was the ticket in question which entitled the holder to passage from Nashua, New Hampshire, to Boston. The defendant used the tickets as far as Lowell, where he arrived March 17th and staid until March 21st. He then continued on to Boston and tendered the ticket in question for his fare. Judgment for the defendant, and the plaintiffs appealed.

J. G. Abbott and S. A. Brown, for the plaintiffs.

D. S. and G. F. Richardson, for the defendant.

By Court, CHAPMAN, J. The plaintiffs, having carried the defendant from Lowell to Boston, March 21, 1860, are entitled to recover their usual fare, being seventy-five cents, unless he has paid or tendered the amount. He offered to the conductor a ticket dated March 16, 1860, and having the words, "Good only two days after date," stamped in red ink upon its face. He contends that the plaintiffs were bound to accept this ticket;

and that, contrary to its terms, he could at his option, and against their will, extend the contract from two days to five days.

But courts of law must enforce contracts as the parties make them, and can neither set aside any of their terms nor add new ones. In the absence of fraud, which is not suggested here, the court can see no reason why the defendant should make his ticket available beyond its terms. The plaintiffs are not bound to issue tickets; and if they do issue them, they alone must fix their terms. They were not bound to make an arrangement by which the defendant, being in Vermont, could purchase a ticket through to Boston. But it is for the accommodation of the public, as well as of railroad companies, that arrangements should exist among connecting lines of roads, and that there should be tickets, by means of which passengers can pass over the whole route. Such arrangements, however, would be impossible, if every passenger were at liberty to disregard them. Should abuses grow out of the system, legislation can correct them.

Judgment for the plaintiffs.

RIGHT OF PASSENGER TO STOP OVER: *Cheney v. Boston etc. R. R. Co.*, 45 Am. Dec. 190, note 192-199. A railway may limit the time within which a passenger ticket may be used: Note to *Commonwealth v. Power*, 41 Id. 479, 480. The principal case is cited to the point that it is the duty of a person about to take passage to inquire when, where, and how he can go or stop, according to the regulations of the railroad company, and if he makes a mistake, which is not induced by the agents of the company, he has no remedy: *Pittsburgh etc. R'y Co. v. Nuzum*, 50 Ind. 144; and that an action against a railroad company for failure to carry plaintiff upon his ticket must be for the breach of contract: *Sears v. Eastern R. R. Co.*, 14 Allen, 436.

BAXTER v. CHELSEA MUTUAL FIRE INS. CO.

[1 ALLEN, 294.]

PRESIDENT OF MUTUAL INSURANCE COMPANY HAS NO AUTHORITY TO WAIVE

BY-LAW that no policy shall be delivered until after the premium is paid, and a vote of the directors that if premiums are not paid within sixty days from the date of policies the policies shall be considered as canceled; and the company is not bound by the representations of the president to a mortgagee that the mortgagor had procured insurance upon the mortgaged property payable to the mortgagee, when in fact the policy had not been delivered because of the failure of the mortgagor to pay the premium.

MUTUAL INSURANCE COMPANIES DIFFER ESSENTIALLY FROM STOCK INSURANCE COMPANIES. They need many by-laws and conditions that are not

required in stock companies, and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself.

CONTRACT. The plaintiff offered to prove at the trial in this court that a policy of insurance upon a house in Chelsea had been duly issued by the defendants to the owner Gerrish, and this policy, with the consent of the defendants, had been assigned to the plaintiff as mortgagee; that shortly before the expiration of this policy, the president of the company orally agreed with Gerrish to renew it and make it payable in case of loss to the plaintiff as mortgagee; that pursuant to this agreement a policy was thus made out, dated March 1, 1857, and signed by the proper officers of the company, but was never delivered, as the premium was not paid nor a deposit note given; that the president and secretary, on several occasions before the fire, which happened on the ninth of June, 1857, requested Gerrish to pay for and receive the policy, and he replied substantially that he would soon do so, but neither the president nor secretary ever informed him that if he failed to do so the policy would be canceled; that after the agreement between Gerrish and the president and before the fire, the plaintiff's agent called upon the president and asked whether the policy had been renewed and made payable to the plaintiff, and the president replied that it had been renewed and the plaintiff was insured, and need not give herself any further concern about it; that the president knew at the time that the policy had not been delivered or the premium paid, and that by his reply the plaintiff was led to believe that she was insured, or otherwise she would have procured insurance on the property in some other company; that Gerrish had obtained many policies from the defendants, and some of them were delivered to him after the expiration of sixty days from their date upon the payment of the premium, and in some cases upon his giving a note for the premium, and the defendants had never objected to deliver policies in this manner merely because of the lapse of time, when no fire had occurred; and that soon after the fire Gerrish called upon the secretary of the company and asked for the policy, and tendered the premium and deposit note therefor. Gerrish was one of the directors of the company, and before the occurrence of the facts above stated had joined the other directors in passing a vote that the premiums on all policies should be payable within thirty days from the date of the policies, and if not

paid within sixty days the policies should be considered as canceled. Neither the plaintiff nor her agent knew of this vote until after the fire. In the by-laws of the company, it was provided that "each person, or company, by its agent upon the execution of his or her or their policy or policies, and before the same shall be delivered, shall pay such premium and give such note for deposit as the president and directors shall from time to time determine." It was ruled that the plaintiff was not entitled to recover, and a verdict was taken for the defendants, subject to be set aside or judgment to be entered thereon, as the court should order.

B. F. Brooks and J. D. Ball, for the plaintiff.

J. P. Healy and J. P. Converse, for the defendants.

By Court, CHAPMAN, J. All but one of the questions raised here have been decided in the recent case of *Brewer v. Chelsea Mut. F. I. Co.*, 14 Gray, 203. In that case, it appeared that Gerrish had taken the same steps towards obtaining insurance that he has done in this case, and they were held to be insufficient. The plaintiff in that case was his mortgagee, to whom the policy was to be made payable in case of loss. It was there held that the president was but a special agent of the company, and could not by his agreements effect insurance on terms forbidden by the by-laws. He had in that case made the same agreement with Gerrish that he did in this case. But the plaintiff proved in the present case that she sent a person to the president to inquire about the matter; and the president, in reply to her agent, represented that Gerrish had obtained the insurance. It is contended that the defendants are estopped to deny the truth of this representation. But the obvious answer to this is, that the president could no more bind the company by his representations beyond the scope of his authority than by his agreements.

It is urged that such a decision will tend to embarrass the business of insurance, because much insurance is necessarily effected by agreements which are to take effect before policies can be made. The answer to this suggestion is, that mutual insurance is essentially different from stock insurance. Much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to

local business, and great abuses have grown out of the undue extension of their business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. Before he has a right to hold them responsible, he must, of necessity, have his contract completed; and it is important, in this species of insurance, that he should make himself carefully acquainted with its terms. Parties who cannot attend to this should obtain insurance of stock companies, or bear their own risks.

Judgment on the verdict.

OFFICERS OF MUTUAL INSURANCE COMPANY CANNOT WAIVE BY-LAWS OF COMPANY: See *Smith v. Haverhill Mutual Fire Insurance Co.*, *infra*, and note. Directors may by their acts waive the by-laws of the company, and a policy issued by them in contravention thereof is not for that reason void: *Campbell v. Merchants' etc. Fire Ins. Co.*, 72 Am. Dec. 324; *Hale v. Union Mutual Fire Ins. Co.*, 64 Id. 370; *Union Mutual Fire Ins. Co. v. Keyser*, Id. 375. In *Sheldon v. Connecticut Mutual Life Ins. Co.*, 65 Id. 565, it is held that a general agent of the company may waive the prepayment of the premium; and see the note thereto 570.

THE PRINCIPAL CASE IS CITED in the following cases: The relation between a mutual insurance company and its members does not permit a relaxation between them of the rule requiring strict performance of conditions precedent: *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. Pr., N. S., 172. And the officers of a mutual insurance company have no authority to waive the by-laws and provisions adopted by the members of such company for their mutual protection: *Mulvey v. Shawmut Mutual Fire Ins. Co.*, 4 Allen, 118; see *Smith v. Haverhill*, *infra*. But while the rule is recognized that a holder of a policy issued by a mutual insurance company is bound as a member of such company to know the rules thereof, yet this has no reference to mere regulations adopted by the officers of the company in regard to the transaction of business, directions to agents, and the like, but rather to such rules as enter into the charter or by-laws of the company whereby the liability and rights of its members are fixed, and the company may thus become bound by the acts of an agent whose powers are not thus publicly restricted: *Waleh v. Aetna Life Ins. Co.*, 30 Iowa, 145.

SMITH v. HAVERHILL MUTUAL FIRE INS. CO.

[1 ALLEN, 297.]

FAILURE TO GIVE NOTICE AND MAKE PROOF OF LOSS FOR SEVENTEEN MONTHS will prevent recovery upon policy of insurance where the application for insurance contained a stipulation that the assured would be bound by the by-laws of the company, and the policy recites that the company will indemnify the assured according to the true intent and meaning of the by-

laws, and refers to the application as binding upon the assured under the limitations and conditions expressed in the by-laws; and the by-laws provide that the assured shall, within thirty days after loss by fire, file with the secretary a particular account of the amount of his loss, etc., and that unless such proofs are produced within thirty days, the losses shall not be payable.

FAILURE TO GIVE NOTICE AND MAKE PROOF OF LOSS WITHIN THIRTY DAYS, as required by by-laws of mutual insurance company, is not waived by a remark of the president, made seventeen months after the loss, that the company would be disposed to do what was right, and that they knew at the time of the fire that it was their loss, and were surprised that they were not notified; or by a subsequent direction of the board of directors, that the assured should send them a statement of the loss, and they would take the subject into consideration, or by a subsequent vote of the directors that the assured be required to make a statement, under oath, in regard to the loss.

KNOWLEDGE OF FIRE BY AGENT OF MUTUAL INSURANCE COMPANY does not relieve the assured from the obligation of giving notice and making proof of loss, pursuant to the by-laws of the company.

STRONG EVIDENCE OF WAIVER OF PROVISIONS OF BY-LAWS OF INSURANCE COMPANY, requiring notice and proof of loss to be made within a specified time, is necessary, when a long time has elapsed between the fire and notice of the loss.

CONTRACT on an insurance policy issued by the defendants to the firm of M. & J. Ricker, of whose estate the plaintiffs are assignees in insolvency. The defense was that the plaintiffs had not given notice and made proof of loss, as required by the by-laws of the defendants. The application for the insurance was made out in the name of Stone as "agent," and contained the clause, "in case of insurance, he [the applicant] holds himself bound by the act of incorporation and by-laws of the company." The application was signed by the assured and delivered to Stone, who forwarded it to the defendants, and received in return the policy in question, which he delivered to the assured. The policy recited that to the application "reference is to be had in explanation of this instrument, and by which the said assured is bound under the limitations and conditions expressed in the by-laws aforesaid," and that the funds of the company were bound to indemnify the assured for loss by fire, "according to the true intent and meaning of the said act of incorporation and by-laws." It was provided in the tenth article of the by-laws that "every member sustaining loss by fire shall forthwith give notice thereof to the company, and within thirty days shall file with the secretary a particular account of the amount of his loss, and the whole value of the property insured at the time of such fire. . . . And unless such proofs, declarations, and certificates shall be

produced within said thirty days, . . . the losses shall not be payable. . . . Any loss not claimed within said thirty days shall not be paid unless by consent of two thirds of the directors." Before the time of the issuance of the policy, the directors of the company had passed a vote appointing Stone as agent. There was no proof, however, of the nature of his agency, except his acts of receiving and transmitting the application and policy in question. On the night of August 3, 1856, the insured property was destroyed by fire, and at that time Stone lived within a few hundred feet of the site of the property. No notice of the loss was given to the defendants until January, 1858. After the fire M. & J. Ricker went into insolvency, and in December, 1857, the plaintiffs became the assignees. About January 1, 1858, Smith, who was one of the assignees, saw the president of the company and informed him of the reason why notice and proof of loss had not been given, which was because the Rickers had another policy, which they looked at by mistake and found it had expired. The president replied that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss, and were surprised that they were not notified, and requested him to go before the directors. The directors, upon his coming before them, directed him to have the Rickers send to them a statement of the loss, and they would take the subject into consideration; but they made no promise of payment. The statement of loss was sent to them. Afterwards the directors voted that M. & J. Ricker be required to make a statement under oath in regard to loss and damage by fire to the property insured. The claim was afterwards considered at several meetings, and finally it was voted not to pay it, and the plaintiffs were notified thereof. A verdict for the defendants was directed by the court, with the agreement that the case should be reported for the consideration of the full court.

W. L. Burt, for the plaintiffs.

J. G. Abbott and S. A. Brown, for the defendants.

By Court, BIGELOW, C. J. This is a very plain case. The plaintiffs claim in the right of the original assured, and are bound by all the stipulations contained in the contract of insurance. By the tenth article of the by-laws, it is provided that the assured shall, within thirty days after a loss by fire, file with the secretary of the company a particular account of the amount of his loss, the value of the property insured at the

time of the fire, and his interest and title therein. It is also further provided by the same by-law, that unless such proofs and declarations are filed within thirty days, losses shall not be payable. The policy was clearly made subject to this by-law. Not only did the assured, in the application which is referred to in the policy, agree to be bound by the by-laws, but the promise of the defendants was to indemnify the assured "according to the true intent and meaning of the act of incorporation and by-laws."

It is not pretended that the provisions of the by-laws were complied with by the assured. No notice of the loss was given to the company until nearly a year and a half after the fire. By the terms of the contract, therefore, the loss was not payable.

There was no sufficient evidence of a waiver of this provision in the by-laws by the directors of the company, nor of any consent to the payment of the loss by two thirds of the directors, according to the stipulations in the same article of the by-laws. All the facts show that the defendants stood on their rights, and never intended to yield anything in the negotiations which they had with the plaintiffs. After so long a lapse of time between the occurrence of the fire and the notice of the loss, very strong evidence of waiver would be necessary. During this interval of time, many old members of the company must have ceased to be associates, by the expiration of their policies, and many new ones had doubtless come in. Under such circumstances, therefore, it is difficult to believe that the directors would consent to admit their liability for a loss from which they had been discharged by the laches of the assured, and which, if allowed, would essentially affect the interests of their policy holders. This view of the case renders it unnecessary to decide whether the directors had power to waive the provisions of the by-laws relating to the notice of loss: See *Hale v. Mechanics' Ins. Co.*, 6 Gray, 173 [66 Am. Dec. 410]; *Baxter v. Chelsea Ins. Co.*, 1 Allen, 294 [*ante*, p. 730].

Judgment on the verdict.

OFFICERS OF MUTUAL INSURANCE COMPANY CANNOT WAIVE BY-LAWS OF COMPANY, at least such as relate to the substance of the contract: *Baxter v. Chelsea Mutual Ins. Co.*, *ante*, p. 730, and note; *Hale v. Mechanics' Mutual Fire Ins. Co.*, 66 Am. Dec. 410, and note 413; *Spring Garden Mutual Ins. Co. v. Evans*, Id. 308.

INSURER, BY RECEIVING NOTICE OF LOSS WITHOUT MAKING OBJECTION to its not being given in time, does not thereby waive such notice: *St. Louis Ins. Co. v. Kyle*, 49 Am. Dec. 74, and note 81; *Trask v. State Fire and Marine Ins.*

Co., 72 Id. 622, note 624. Power of a general agent of an insurance company to waive a defective notice of loss: See note to *Manufacturing Co. v. Fire Ins. Co.*, 66 Id. 380. In *Cornell v. Milwaukee Mutual Fire Ins. Co.*, 18 Wis. 393, it was held, citing the principal case, that where the condition of the policy required a written notice of loss to be given to the secretary within twenty days after the loss, and a written notice was given after the expiration of the time stating the fact that the assured had given oral notice to the company's agent within the time limited, the neglect of the company to object at the time to this statement did not constitute a waiver of its right to object to the notice as insufficient. Also, after such written notice was given, the secretary of the company wrote to the attorneys of the assured, who had requested a settlement, that the president of the company would be in their place on a specified day to arrange the matter, and afterwards wrote them that the matter was in the hands of the company's attorney, and when he returned to town the company could inform them what would be done. It was held that these statements did not constitute any waiver of the company's right to object to the notice as insufficient.

UNLESS WAIVED BY INSURANCE COMPANY, NOTICE AND PROOFS OF LOSS must be furnished in due time by the assured as a prerequisite to his right of action on the policy: *Campbell v. Charter Oak etc. Ins. Co.*, 10 Allen, 217; *In re Firemen's Ins. Co.*, 8 Bank. Reg. 126; S. C., 3 Biss. 464, citing the principal case; see note to *Trask v. State Fire and Marine Ins. Co.*, 72 Am. Dec. 622.

WYMAN v. PEOPLE'S EQUITY INSURANCE CO.

[1 ALLEN, 301.]

POLICY OF INSURANCE IS NOT AVOIDED ON GROUND OF VIOLATION OF BY-LAW of company requiring the true title of the insured in the property to be expressed in the application for insurance, where the insured is a mortgagee in possession, and the application is for insurance "on dwelling-house," and states, in reply to a question as to incumbrances: "First mortgage to M. W. [the name of the applicant], entered October, 1855;" and in reply to a question whether the property is insured, states: "Not on first mortgagee's interest," and the application contains no direct question as to the title of the applicant; for there is no misstatement of the applicant's interest, and it is the duty of the company to require fuller statements in this regard, if the answers given are not sufficiently full.

NOTICE TO INSURANCE COMPANY CLAIMING TOTAL LOSS OF WOODEN BUILDING, which was wholly consumed, with the exception of bricks of walls and chimneys and stone-work of the building, is a sufficient statement of the loss, though the by-laws of the company require a statement of the value of such parts as remain; especially when the amount insured was much less than the value of the building, and the value of the brick and stone was very small.

CONTRACT on policy of insurance for one thousand five hundred dollars. A general verdict, under the instructions of the court, was returned for the plaintiffs, and the defendants alleged exceptions. The opinion states the case.

B. F. Butler and W. P. Webster, for the defendants.

P. Willard, for the plaintiffs.

By Court, DEWEY, J. In defense of the present action, two grounds are relied upon: 1. That there was in the application such a want of true representation of the title of the assured to the property as avoids the policy; 2. That the notice of the loss was not in accordance with the by-laws; and that, by reason of want of due notice, the right to maintain this action fails.

As to the first objection, it is not contended that there was any false representation, or any false answer given in response to any question in the series propounded by the company in the application. Had there been any such, under our decisions, the policy must have been held invalid.

The sole question here is, whether this policy is void by reason of article 17 of the by-laws of the company, declaring "any policy issued by this company shall be void, unless the true title of the insured in the property be expressed in his application for insurance." Corresponding with this provision, we might have expected to find some interrogatory put to the applicant, calling for an answer as to his title in the property. But such is not the case. The further inquiry, then, is as to the manner in which the title is stated, and whether the true title is not sufficiently expressed. The true title of the insured was that of a first mortgagee, for the sum of one thousand five hundred dollars, the condition of the mortgage having been broken, and the mortgagee having entered for foreclosure two years previous to the making of the policy. It is to be remarked that the applicant nowhere describes the property as her own absolutely. The application is for an insurance "on dwelling-house."

In answer to the first inquiry bearing on the title (interrogatory 10), "Is the property incumbered, and to what amount?" the answer is: "First mortgage to M. Wyman" (the name of the plaintiff). "One thousand five hundred dollars, entered October, 1855." To the eleventh interrogatory, "Is the property insured?" the answer is: "Not on first mortgagee's interest; not known to be by any other concern." These answers, taken in connection with the fact that there is no other statement of the interest of the applicant to control or modify it, or calculated to mislead, must be deemed to represent the interest of the applicant truly, and to apprise

the company that she was not the absolute owner in fee-simple. If they were not sufficiently full, it was the duty of the company to require further and fuller statements. Had the nature of the interest been stated untruly, the by-law might properly be set up in bar of the plaintiff's right of recovery. But such was not the case, and this ground of defense must fail.

2. The objection to the form of the notice is then to be considered. The objection to this, as stated in the report of the case, is that a total loss was therein claimed, and no statement was made of the value or amount of the materials not destroyed by the fire, consisting of the bricks of the walls and chimneys, and stone-work of the building. We think the statement of the loss was sufficient; certainly so, if not objected to on that account, and a more particular statement required. The notice stated that the building was consumed by fire on the twenty-seventh of August, 1858, and was a total loss. That was true; and the omission of the fact that the brick chimneys and the stone-work of the building were not burned up, could hardly be said to mislead the insurers of a wooden building, as this was stated in the policy to be. It is said that article 14 of the by-laws required that the notice should state "the value of such parts as remain." We can hardly think this provision applicable to a case of entire destruction of the building insured, leaving nothing but bricks and stone, such as were left in the present case. But the entire features of the case show that it would have been entirely useless to the insurers to have had the statement as to these articles. The value of the building insured was two thousand five hundred dollars; the claim for insurance was one thousand five hundred dollars, which was the sum insured, and this sum was recoverable; and the fact that brick and stone to the value of one hundred and eight dollars and seventy-five cents remained unconsumed by the fire was wholly immaterial. We are of opinion that this defense, of want of more full statement of the value of the bricks and stone remaining after the building itself was totally consumed by fire, should not, under the facts found in the present case, avail the defendants.

Exceptions overruled.

PROPERTY MAY PROPERLY BE DESCRIBED BY INSURER AS HIS HOUSE, though his title is equitable only, as when he has erected the house on premises which he held under a parol agreement for their purchase: *Hough v. City Fire Ins. Co.*, 76 Am. Dec. 581.

MISREPRESENTATIONS AND CONCEALMENTS IN APPLICATION FOR INSURANCE WHEN AVOID POLICY: See *Gould v. Mutual Fire Ins. Co.*, 74 Am. Dec. 494, and cases cited in the note 498; *Richardson v. Maine Ins. Co.*, Id. 459, note 462. A fraudulent concealment with respect to the interest of the insured in the insured property, to the prejudice of the insurer, will avoid the policy; *Morrison v. Tennessee etc. Ins. Co.*, 59 Id. 299, note citing prior cases 312.

THE PRINCIPAL CASE IS CITED to the point that if the company refused to pay on the ground that the protest did not state the cause of loss, it was their duty to point out the defect and advise the insured that it refused to pay on that ground, and a failure to do so may constitute a waiver of the right to require proofs: *Insurance Co. v. Parisot*, 35 Ohio St. 41. So where a policy requires the assured to furnish written proofs of loss as soon thereafter as possible, and also requires him, at the option of the company, to submit to an examination under oath by an agent of the company, if the assured before furnishing the formal proofs submits to an examination under oath required by the insurer, and subscribes the statement thereof, which is then delivered to and received by the insurer's agent, without any demand thereafter made for formal proofs, this is evidence upon which a jury may find a waiver of such proofs: *Badger v. Phoenix Ins. Co.*, 49 Wis. 400, citing the principal case.

TEBBETTS v. HAMILTON MUTUAL INSURANCE CO.

[1 ALLEN, 305.]

POLICY WILL BE AVOIDED FOR FAILURE TO MENTION IN APPLICATION SEVERAL BUILDINGS within one hundred feet of insured property, in reply to a question, "What is the distance and direction of said building from other buildings within one hundred feet? and how are such other buildings constructed and occupied?" although a jury decides that these omitted buildings were not material to the risk, where the application and by-laws of the company are made a part of the policy, and the by-laws provide that the application shall be held to be a warranty by the assured, and that "unless the applicant for insurance shall make a correct description of and statement of all facts required or inquired for in the application, and also all other facts material in reference to the insurance or to the risk or to the value of the property, the policy issued thereon shall be void;" and the application contains a covenant at the end that "the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance."

WHERE, TAKING WHOLE INSTRUMENT TOGETHER, IT IS OBVIOUS THAT INSURANCE COMPANY have made the strict and literal exactness of the answers to certain questions a condition of the contract of insurance and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured, for they have a legal right to say that they will determine for themselves what is or is not material to the risk, and will base their contract upon the answers of the insured to specific interrogatories.

COVENANT IN APPLICATION FOR INSURANCE that "applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this

insurance," is a warranty on the part of the insured that all the facts inquired into are correctly given whether material or not, and all other facts material to the risk are correctly given even if not inquired into. Nor can a provision that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss" qualify the previous covenant, because it can have its full effect consistently with it.

CONTRACT on a policy of insurance. Verdict for the plaintiff, and exceptions alleged by the defendants. The opinion states the case.

B. F. Butler and J. W. Perry, for the defendants.

R. B. Caverly, for the plaintiff.

By Court, HOAR, J. The application upon which the policy of insurance was obtained contained this interrogatory: "What is the distance and direction of said building [*i. e.*, the building containing the property to be insured] from other buildings within one hundred feet? and how are such other buildings constructed and occupied? Annex a ground-plan to the application." The answer was, "See diagram," and a description of the neighboring property, containing these words: "East, Prescott street." Prescott street was laid down on the diagram. On the opposite side of Prescott street, and within the one hundred feet, were several buildings, and among them three wooden carpenters' shops, which were neither represented on the diagram nor mentioned in the answer. The jury found that these buildings were not material to the risk; and the question presented for our decision is, whether the omission to disclose these buildings is a bar to the plaintiff's recovery upon the policy.

The application and the by-laws of the company are expressly made a part of the policy of insurance, a copy of the by-laws being appended to it; and the defendants rely upon the stipulations which they contain. By the sixth article of the by-laws, "the application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance as if it were actually incorporated therein in full."

The thirteenth article of the by-laws provides that, "unless the applicant for insurance shall make a correct description of and statement of all facts required or inquired for in the application, and also all other facts material in reference to the insurance or to the risk or to the value of the property, the policy issued thereon shall be void."

The application contains an agreement that every question shall be fully and distinctly answered; and at the end of it are these covenants, among others: "And the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance. . . . The applicant further agrees that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss."

It is also stipulated in the application that "if any interrogatories are not fully answered in writing by the applicant, it is assumed that the facts in relation to them are most favorable to the title and to the risk, and they are so construed in writing the policy."

It is apparent, in the first place, that the answer to the interrogatory in the application does not "make a correct description of and statement of all facts required, or inquired for in the application." The interrogatory is not in terms confined to such buildings within one hundred feet as are material to the risk. It embraces all buildings within the distance named, and inquires as to their construction and occupation. It appears, therefore, that the defendants directly required the information included in the terms of the question. Whether a jury might think it material to the risk could be of no consequence, if the defendants chose to make it a condition of the validity of the contract. Although policies of insurance are to be liberally construed, and in such a manner as to secure, if possible, the protection which they are designed to afford, it is not in the power of the court to disregard stipulations which the parties have expressly made. And if, taking the whole instrument together, it is obvious that the defendants have made the strict and literal exactness of the answers to certain questions a condition of the contract, and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured. They have a legal right to say: "We choose to determine for ourselves what is or is not material, and to base our contract upon such information as the insured is required to communicate in answer to specific interrogatories." *Davenport v. New England Ins. Co.*, 6 Cush. 340; *Miles v. Connecticut Ins. Co.*, 3 Gray, 580.

If the express warranty of the correct statement of the facts inquired for, according to the thirteenth article of the by-laws, were qualified by any other agreement or clause, as in the case of *Elliott v. Hamilton Ins. Co.*, 18 Gray, 139, so that we could

find upon the whole instrument that the parties intended to limit the extent to which the insured should be held responsible for the accuracy of the answers given, we should gladly apply the rule of construction which that case declares. But the cases are wholly different. In that case, the insured agreed that the description of the property contained in his answers was correct only so far as regarded "the condition, situation, value, title, and risk on the same." Here that agreement is omitted, and in its place is inserted the explicit and stringent covenant, that "the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance." We think the only fair interpretation of this is, that the insured warrants that all the facts inquired for are correctly given, and all other facts material to the risk, even if not inquired for. The provision that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss," cannot qualify the previous covenant, because it can have its full effect consistently with it. The answers might fail to give the information inquired for, and yet no material fact be misrepresented or suppressed. On the other hand, the answers might be complete and true, and material facts not embraced in the interrogatories might be incorrectly represented or purposely omitted.

The result to which we have come upon this part of the case renders it unnecessary to consider the other questions discussed in the argument, which arise on the report, and some of which are of considerable difficulty. The point decided is conclusive against the plaintiff's right to recover. The verdict must be set aside, and a new trial granted.

OMISSION TO MENTION ALL BUILDINGS WITHIN TEN RODS, in answer to question, did not avoid the policy in *Gates v. Madison County etc. Ins. Co.*, 55 Am. Dec. 360, note 369, citing prior cases upon this question. But see *Frost v. Saratoga Mutual etc. Ins. Co.*, 49 Id. 234; *Burritt v. Saratoga Co. etc. Ins. Co.*, 40 Id. 345. The facts involved in *Hardy v. Union Mutual Fire Ins. Co.*, 4 Allen, 223-225, were quite similar to those of the principal case, and the principal case was followed in the decision.

WARRANTIES IN INSURANCE CONTRACTS: See note to *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 462-471. Circumstance or act warranted need not be material to risk which distinguishes an express warranty from a representation: *Duncan v. Sun Fire Ins. Co.*, 22 Id. 539; *Fowler v. Aetna Fire Ins. Co.*, *supra*.

THE PRINCIPAL CASE CAME again before this court, and is reported in 3 Allen, 569.

CALVERT v. HAMILTON MUTUAL INSURANCE CO.

[1 ALLEN, 308.]

INSURED IS BOUND TO DISCLOSE CHANGE MADE IN INSURED PROPERTY after issuance of policy, whether material or not, if he would have been bound to disclose such a condition of the property, in answer to the interrogatories, had it existed at the time of making the application for the insurance, where the by-laws of the company, which are made a part of the policy, provide that if subsequent to the making of the application any new fact shall exist by a change of any fact disclosed in the application, or the erection or alteration of any building which increases the risk, or which it would have been necessary to state had it existed at the time the application was made, the policy shall be void, unless written notice thereof shall be given the directors, and their written consent obtained.

CONTRACT upon an insurance policy. Verdict for the plaintiffs, and exceptions alleged by the defendants. The opinion states the case.

W. L. Burt, for the defendants.

B. F. Butler, for the plaintiffs.

By Court, HOAR, J. In this case, it was shown that a building described in the application, on the south-east corner of the main building, as "one story in height, and twenty by twelve feet, and used for wool-washing," was removed after the policy issued, without any such consent of the defendants as the policy required, and another building was put up in its place, two stories in height and twenty by thirty feet, and used for drying wool by means of stoves. The defendants contend that this alteration avoided the policy. The question depends upon the construction to be given to the fourteenth article of the by-laws of the insurance company, which is in these words: "If, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building, the carrying on of any hazardous trade, the deposit of any hazardous goods in or near the property insured, by the assured or others, which increases the risk, or which it would have been necessary to state had it existed at the time the application was made, the policy thereon shall be void, unless written notice thereof shall be given the directors, their written consent, signed by the secretary, obtained, and an additional premium and deposit paid."

The provisions and covenants as to the answers in the application to all matters inquired for were substantially the

same as in the case of *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen, 305 [*ante*, p. 740], and the rights of the parties respecting them are therefore the same.

The instructions given by the court upon this point were, that "if any additions or alterations have been made by the plaintiffs or others in the property insured, or in the mode of using it, which did not increase or change the risk in any manner, and which would not have been necessary to be stated in order to a full understanding of the risk at the time of the application, and such alterations or additions in no way affected the risk, such alterations or additions would not avoid the policy."

We are of opinion that these instructions appended to the provision in the by-law a qualification which essentially varied its meaning. The by-law does not use the phrase, "which it would have been necessary to state, had it existed at the time the application was made," with the limitation, "in order to a full understanding of the risk;" but uses it without any limitation whatever. Whether the alteration increases the risk, or whether it comes within the scope of the questions asked by the company, although not, in the judgment of others, material to that risk, it is to be communicated, or the policy becomes void.

The defendants had the right to reserve to themselves the power to decide upon what statement of facts the contract should be made; and to determine for themselves what facts it was important to them to know. This right they had carefully guarded by other provisions in the policy. They required certain facts to be fully and exactly stated, in answer to specific interrogatories, and without regard to the materiality of the facts, as a condition of the validity of the contract. By language clear and unmistakable, and precisely adapted to accomplish their purpose, they extended the same rule to the case of alterations made after the policy had issued. They reserved the right to cancel the policy when it should be considered injurious to the company. They chose to retain the power of exercising their own judgment upon the expediency of terminating the risk, upon a view of facts of the same kind as those which they required to be made known to them before the risk was first assumed. The plaintiffs covenanted that this information should be furnished or that the policy should become void. The alterations were made; a building of different height and dimensions from that stated in the applica-

tion was erected. If such a building had existed at the date of the application, it would have been necessary to disclose it, in order to answer the interrogatories fully or properly; and the information was not given. The law will not allow the opinion of witnesses, or of the jury, to have the effect of dispensing with the performance of the express terms of a lawful contract. The policy has become void.

If the terms on which the defendants are willing to issue policies are such as are inconsistent with the reasonable security of the insured, the remedy must be sought from the legislature, or the public must resort to companies whose rules afford a better chance of protection. Our whole authority and duty is to interpret and enforce the agreements of parties, and not to make or change them.

Exceptions sustained.

ALTERATIONS IN INSURED PREMISES, EFFECT OF UPON POLICY: See *Padgett v. Providence M. F. Ins. Co.*, 67 Am. Dec. 496, and cases cited in the note 496.

MISREPRESENTATIONS AND CONCEALMENTS IN APPLICATION, WHEN AVOID POLICY: See *Gould v. Mutual Fire Ins. Co.*, 74 Am. Dec. 494, note 496; *Richardson v. Maine Ins. Co.*, Id. 459, note 462; *Tebbets v. Hamilton Mutual Ins. Co.*, ante, p. 740, and note.

EDMANDS v. MUTUAL SAFETY FIRE INS. CO.

[1 ALLEN, 511.]

MORTGAGE IS MATERIAL ALTERATION IN OWNERSHIP OF PROPERTY INSURED, and if not consented to as provided in the by-laws of the insurance company, will avoid a policy issued "under the conditions and limitations expressed in the by-laws," which provide that "all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within thirty days."

CONTRACT on a policy of insurance. The opinion states the case.

A. V. Lynde, for the plaintiff.

W. L. Brown, for the defendants.

By Court, CHAPMAN, J. This is an action of contract on a policy of insurance, which is declared on its face to be issued "under the conditions and limitations expressed in the by-laws," which are annexed to the policy. Article 11 of the

by-laws provides that "all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within thirty days." It appears that subsequently to the making of the policy, the plaintiff made a mortgage of the property to one Wheeler; and the defendants contend that this mortgage avoids the policy.

But a mortgage is held not to be an alienation of the property: *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418 [34 Am. Dec. 69]; *Rice v. Tower*, 1 Gray, 426. It is, however, an alteration in the ownership. It alters it from a legal to an equitable ownership. It introduces a new owner, to the extent of the sum secured by the mortgage, and to the same extent it takes away the direct interest of the assured.

But to bring it within the by-law, it must be a material alteration. It is not material in respect to the lien of the defendants, because a subsequent mortgage must be subject to the lien. But it is not necessary that it should affect the lien in order to make it material: *Davenport v. New England Ins. Co.*, 6 Cush. 340; *Packard v. Agawam Ins. Co.*, 2 Gray, 334. In the case first cited, the court remarked as follows: "But irrespective of the lien, whether the defendants would or would not have one, the misrepresentation was clearly a material misrepresentation. It was material for the insurers to know of the incumbrances, in reference to the responsibility of the insured, and his ability to meet his engagements to the company; it was material to know who was interested in or had any title to the estate, but more particularly and especially was it material for the defendants to know what interest the plaintiff himself had in the premises, and whether his estate was incumbered or unincumbered." These remarks were made in regard to a mortgage existing at the time of issuing the policy, but not stated by the insured in his application. They have the same force in regard to a mortgage made after the issuing of the policy, if the parties make their contract in reference to such a mortgage, as they seem to have done here. They had a right to treat such an alteration of the title as material, if they judged it to be so, and the language of the eleventh by-law shows that they did thus judge. Unless we give this construction to the word "alterations," it has no force. This construction of the by-law is aided to some extent by the fact that the application contains inquiries as to the ownership

of the property and incumbrances upon it; and on the back of the policy there is a blank form for an assignment of it in case of a mortgage, and also a form for the assent of the directors to such mortgage. And after this mortgage was made, the plaintiff left the policy with the secretary to get the assent of the directors, but failed to obtain it. One reason of the failure was, that the plaintiff had neglected to sign the assignment of the policy. It appears, therefore, that the parties understood the by-law as the court have construed it. It is a different provision from any that has been contained in any other policy that has come before the court for interpretation.

Exceptions sustained.

ALIENATION AND ALTERATION IN OWNERSHIP, WHAT IS, WITHIN MEANING OF POLICY: See *Young v. Eagle Fire Ins. Co.*, 74 Am. Dec. 673; *Morrison's Adm'r v. Tennessee M. & F. Ins. Co.*, 59 Id. 299, and note treating this subject 304-312, and discussing the principal case at page 309.

THE PRINCIPAL CASE IS CITED in the following cases: A mortgage is an "alteration of ownership" avoiding a policy: *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 166. And a mortgage of the insured property, without the consent of the insurers, will avoid the policy which contains a clause that the policy should be void in case it or the interest insured by it should be sold, assigned, transferred, or pledged, without the previous consent of the insurers: *Atherton v. Phoenix Ins. Co.*, 109 Id. 35. So a policy with a condition avoiding it in case the property insured shall be subject to additional incumbrances without notice to the insurer is avoided if the insured subsequently mortgages the property without such notice, whether or not he knew of the proviso: *Fuller v. Madison Mutual Ins. Co.*, 36 Wis. 604. But where the condition in the policy is that it shall be avoided by any changes in title or interest, etc., which occur by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree. A mortgage, though a change of title, is not an alteration embraced in this condition, and will not avoid such a policy: *Judge v. Connecticut Ins. Co.*, 132 Mass. 523. The case of *Dolliver v. St. Joseph Ins. Co.*, 128 Id. 318, did not require the consideration of the question whether a subsequent mortgage should be regarded as "a change of title" which would avoid a policy containing nothing to explain the sense in which those words were used.

BINGHAM v. JORDAN.

[1 ALLEN, 372.]

MORTGAGE OF PERSONAL PROPERTY IS INVALID AGAINST ASSIGNEE IN INSOLVENCY OF MORTGAGOR when the mortgage is not recorded and the property is not delivered to the mortgagee, but is retained by the mortgagor until the insolvency.

TORT against the assignees of Parker, Clapp, & Co., to recover goods mortgaged to the plaintiff by Parker, Clapp, &

Co. The mortgagors' place of business was Boston, but only one of them resided in Boston; the other lived in Chelsea. The mortgage was recorded in Boston, but not in Chelsea, before the first publication of notice of the proceedings in insolvency. Upon these facts, it was ruled that the plaintiff could not recover, and a verdict was rendered for the defendants, and the plaintiff alleged exceptions.

H. C. Hutchins, for the plaintiff.

B. F. Brooks and J. D. Ball, for the defendants.

By Court, HOAR, J. The single question which this case presents is, whether the assignee in insolvency of the mortgagor of personal property, where the mortgage was not recorded according to law, and the possession of the property was retained by the mortgagors until the insolvency, is to be regarded as a "party" to the mortgage, so as to come within the exception in the statute which provides that such mortgages "shall not be valid against any person other than the parties thereto:" Gen. Stats., c. 151, sec. 1. We are of opinion that he cannot be so regarded, and that the ruling of the court at the trial was right.

The assignment "vests in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken in execution on any judgment against him at the time of the first publication of the notice of issuing the warrant" to the messenger: Stats. 1838, c. 163, sec. 5. By this provision, the assignee, while for some purposes he represents the debtor and stands in his place, is clothed with much higher and more extensive rights in relation to the estate than the debtor himself possessed. And in respect to mortgaged personal property, we think that his rights, as representing the creditors, are such as bring him not only within the plain letter of the statute, but within its spirit and purpose. Without registration or delivery, a mortgage of personal property has no validity against a purchaser from the mortgagor, even with notice of the mortgage: *Travis v. Bishop*, 13 Met. 304. The debtor could therefore have sold this property, and have given a perfect title to a purchaser. The opinion was strongly intimated in *Denny v. Lincoln*, Id. 200, that an attachment would hold against an unrecorded mortgage, although the attaching creditor had notice of it. And in *Briggs v. Parkman*, 2 Id. 258 [37 Am. Dec. 89], it seems to be assumed that if the

mortgage were not recorded until after the first publication of the notice of issuing the warrant in insolvency, the title of the assignee would prevail.

At common law, a mortgage of personal property, without delivery, would stand on no better ground than any other sale; and the policy of the law, in requiring registration, could hardly be made effectual under the provisions of the insolvent law, if assignees were not allowed to take, for the benefit of creditors, property which the creditors themselves might have taken on execution, or which the debtor might have conveyed to them in satisfaction of their debts.

Exceptions overruled.

CHattel mortgage, if properly recorded, is valid without delivery to and possession by the mortgagee of the chattels mortgaged: *Call v. Gray*, 75 Am. Dec. 141, note 144; *Gregg v. Sanford*, 76 Id. 719.

THE PRINCIPAL CASE IS CITED to the point that an unrecorded chattel mortgage is invalid against any other person than the parties to it, and actual notice of the mortgage can make no difference: *Lockwood v. Slevin*, 26 Ind. 125; *Howard v. Chase*, 104 Mass. 251; and to the point that assignees in insolvency under the comprehensive rule by which the assignee is vested with all the rights of property belonging to the bankrupt, acquire the same right as creditors to avoid any transactions of the insolvent debtor which were intended to enable a third party to hold his property in trust for his own benefit: *Crope v. Kelly*, 16 Wall. 638. In *In re Griffiths*, 3 Nat. Bank. Reg. 180, S. C. 1 Low. 433, it is held that an unrecorded mortgage of personal property which has not been delivered to and retained by the mortgagee is valid against the assignee in bankruptcy of the mortgagor, distinguishing the principal case on the ground that under the United States bankrupt act the assignee stands merely in the place of the debtor, and liens valid against the debtor are valid against him, while under the state insolvent law of Massachusetts the assignee takes, not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency. In *Gooding v. Riley*, 50 N. H. 409, it is held that a chattel mortgage without the affidavit required by law is valid against a subsequent mortgagee who has notice that the prior mortgage was made in good faith and for a full consideration, and the court refuses to follow the rule of the Massachusetts authorities that actual notice in the case of chattel mortgages will not validate a defective mortgage.

BOSTON AND WORCESTER RAILROAD CORPORATION v. SPARHAWK AND WIFE.

[1 ALLEN, 448.]

PARTY TO JUDGMENT CANNOT BE PERMITTED IN EQUITY ANY MORE THAN AT LAW COLLATERALLY TO IMPEACH IT on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered.

BILL in equity to enjoin the defendants from destroying a fence built on the plaintiffs' land, and along the line of their railroad, averring that the defendants had repeatedly pulled down the fence under pretense that they owned the land on which it stood. A temporary injunction was granted upon the filing of the bill. The defendants in their answer set forth several judgments and proceedings to which the parties to this suit were parties or privies, and averred that these judgments, or some of them, were based on error and mistake in this, that the court was influenced and governed in rendering these judgments by surveys and plans erroneously made. At the trial, the plaintiffs, to prove their ownership of the land on which the fence was built, offered in evidence a judgment of this court rendered at the March term, 1843, against Sparhawk and wife, and in favor of one Tolman, for the recovery of land which included the land in question; also a conveyance of the same land by Tolman to the plaintiffs. The defendants then proposed to prove by the testimony of one of the surveyors who made the alleged erroneous surveys, and otherwise, that this judgment was founded in error and mistake, and was not binding upon them. Upon objection to this evidence, the court ruled it out, on the ground that the judgment, so long as it remained unreversed, was binding upon the defendants, and they could not impeach it collaterally in a bill in equity, on proof of error or mistake in the rendition thereof. There being no other defense, the court held that the plaintiffs were entitled to a perpetual injunction. The defendant appealed to the whole court.

G. Sparhawk, for the defendants.

G. S. Hale, for the plaintiffs.

THE COURT. A party to a judgment cannot be permitted in equity any more than at law collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered.

Injunction made perpetual.

JUDGMENT OF COURT HAVING JURISDICTION IS CONCLUSIVE UPON PARTIES UNTIL REVERSED: *Reynolds v. Harris*, 76 Am. Dec. 459, note 463; and will not at the instance of a party be inquired into collaterally in equity: See *Peters v. League*, 71 Id. 622; *Schley v. Dixon*, Id. 121. Judgment obtained by fraud, when equity relieves against: See *Bank of Tennessee v. Patterson*,

47 Id. 518, note 622; *Strop v. Sullivan*, 46 Id. 393, note 393; *Pearce v. O'Brien*, Id. 423, note 423. Fraud as a defense to a judgment: See *Dobson v. Pierce*, 62 Id. 152, note 158; note to *Greene v. Greene*, 61 Id. 468; *Knight v. Savage Mfg. Co.*, 71 Id. 600. The principal case is cited to the point that the judgment of a court having jurisdiction cannot be impeached, in *Wood v. Mann*, 125 Mass. 320; and that a party to a judgment cannot be permitted in equity any more than at law collaterally to impeach it on the ground of mistake or fraud, in *Christmas v. Russell*, 5 Wall. 306. Fraud perpetrated by a party in procuring a judgment does not render it absolutely void, but is only cause for having it declared void in a proceeding instituted for that purpose and in proper time, as between parties and privies; though strangers may attack a judgment collaterally at any time on the ground of fraud: *Murchison v. White*, 54 Tex. 85; *Michaels v. Post*, 21 Wall. 427; 8 C., 12 Nat. Bank. Reg. 167, citing the principal case.

FAY v. SMITH.

[1 ALLEN, 477.]

ALTERATION OF PROMISSORY NOTE BY ADDITION OF WORDS "WITH INTEREST," though made with the consent of one promisor, and without fraudulent intent, totally avoids it as to the other promisor.

CONTRACT upon a promissory note signed by one Reed upon its face, and by the defendant upon its back, payable ten months from date, and indorsed by the payee to the plaintiffs. It was not alleged or contended at the trial that the addition of the words "with interest," after the defendant signed the note, was made with fraudulent intent. The court ruled that, notwithstanding the alteration, the plaintiffs were entitled to recover the principal sum, with interest from the maturity of the note, and a verdict was returned accordingly. The defendant alleged exceptions.

J. Q. A. Griffin, for the defendant.

J. C. Dodge, for the plaintiffs.

By Court, HOAR, J. The defendant, not being named as a party to the note in suit, placed his name upon the back of it, before it was delivered by the promisor, Reed, to the payee, and thereby, according to the settled law of Massachusetts, made himself jointly liable as an original promisor. The note, when he thus placed his name upon it, was not payable with interest; but the other promisor had agreed, with the payee, to give him a note bearing interest, and the words "with interest" were added by the procurement of the payee, and with the assent of Reed, but without the knowledge or authority of

the defendant; and with this alteration the note was taken by the payee and indorsed to the plaintiffs.

The plaintiffs contended at the trial that the alteration having been made without fraudulent intent, they should be allowed to recover upon the note as it stood when the defendant signed it; and the presiding judge so ruled. But we are of opinion that this ruling cannot be supported, and that the verdict must be set aside, and a new trial granted. We think no case has gone so far in this commonwealth as to hold that, where a material alteration in a contract has been made by the payee or obligee, with the express intention of changing the operation of the contract itself, and of making it in terms a different contract, it could afterwards be enforced, even in the absence of any fraudulent intent. But whether this be so or otherwise, in a case in which the alteration is made after the delivery of the writing, the case at bar must be governed by a principle which depends upon wholly different considerations.

This note is a contract in writing, and purports to be the contract of both Reed and the defendant. If both are bound by it, it is the same contract by each of them. The writing is single, and cannot be treated as if it contained two separate agreements, one binding upon the one and the other upon the other. The payee never received it, or agreed to receive it, as a note not bearing interest. He took it as a note payable with interest, having the signature of Reed appended to it as such, and delivered by Reed to him as an effectual contract according to its tenor. He knew that, as it was signed by the defendant, it was not a note bearing interest; and he assumed that Reed had authority to make the defendant a party to the new contract which the insertion of the words "with interest" constituted. But Reed had not such authority; and the contract which the payee of the note received does not, therefore, bind the defendant. The defendant never made the note which the payee accepted.

There seems to be no difference in principle between this case and one where a note should be signed by two persons for the sum of three hundred dollars, and one of them, supposing he had authority from the other, but really without his consent, should strike out the words "three hundred dollars," and insert in their place "five hundred dollars," and then negotiate the note. The other signer would be wholly discharged, not on the ground of fraud and forgery, but of want of authority to bind him. The note used he did not execute; the note which

he executed was never used, but was destroyed by the alteration, and another substituted for it.

The plaintiffs' declaration shows that they rely upon a different contract from the one which was signed by the defendant, the only contract to which he ever assented; and if the words "with interest" could be stricken out and treated as a nullity, there would be a variance between the declaration and the proof.

New trial granted.

MATERIAL ALTERATION IN NEGOTIABLE INSTRUMENT will render it invalid even in the hands of an innocent holder as against any party thereto not consenting to the alteration, and this rule applies to an accommodation note altered before it is negotiated: *Frigg v. Taylor*, 72 Am. Dec. 263; *Miller v. Reed*, 67 Id. 459, and note 462, collecting the prior cases; *Sturges v. Williams*, 75 Id. 473; see *Martin v. Good*, 74 Id. 545. The principal case is cited in the following cases: A material alteration in a bill or note after its execution and delivery to the payee, or after its indorsement, vitiates the instrument except as against parties consenting to the alteration: *Wade v. Wilmington*, 1 Allen, 562; *Hert v. Oehler*, 80 Ind. 88; *Eckert v. Louis*, 84 Id. 104; *Cronkitt v. Nebeker*, 81 Ind. 328. A material alteration of a note made by one of the promisors before its delivery, without the knowledge of the other promisor, makes the note void as against the other promisor; although the alteration is made without the knowledge of the payee and without fraudulent intent: *Draper v. Wood*, 112 Mass. 319. A fraudulent and material alteration of a promissory note without the consent of the party sought to be charged thereon, whether made before or after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration: *Greenfield Savings Bank v. Stowell*, 123 Id. 198, 203. Thus the alteration of a promissory note by the direction of one of several joint makers, by increasing the rate of interest, without the consent of the other makers, discharges the latter from all liability thereon: *Schneewind v. Hackett*, 54 Ind. 255. So where made by a principal, it will discharge a surety on the note: *Harsh v. Klepper*, 28 Ohio St. 204. A person indorsed a negotiable promissory note for five hundred dollars for the maker's accommodation. The maker then, by the use of chemicals, rendered the amount of the note invisible, wrote in two thousand dollars instead, and procured the note to be discounted at a bank as a note for two thousand dollars. Before the note became due, the fraud was discovered and the original writing was restored, and the note was duly protested and an action brought against the indorser as on a note for the original amount, but it was held that the indorser was not liable: *Citizens' National Bank v. Richmond*, 121 Mass. 111.

ATWOOD v. DEARBORN.

[1 ALLEN, 433.]

FACT THAT TESTIMONY OF WITNESS IS CONTRADICTED DOES NOT AUTHORIZE PARTY CALLING HIM to offer evidence that his general reputation for truth is good. Such evidence is admissible only when the opposite side has attempted to impeach his general reputation.

WHERE GOODS ARE OBTAINED BY FRAUD, VENDOR MAY RECLAIM THEM AGAINST ALL PERSONS except a *bona fide* purchaser without notice, and an officer who takes them in behalf of creditors by legal process does not come within the exception.

ACTION LIES AGAINST OFFICER TO RECOVER GOODS ATTACHED BY HIM as the property of a person who purchased them from the plaintiff by means of false representations, without proof that the attaching creditor had knowledge of the fraud.

TORT by Atwood and another against a deputy sheriff for the conversion of goods attached by him as the property of Tufts, and alleged to have been purchased by Tufts from the plaintiffs by means of false representations. There was a conflict of evidence at the trial between one of the plaintiffs and Tufts as to the facts attending the purchase, and the defendant offered evidence to show that Tufts was a man of good reputation for honesty and moral worth; but the court excluded the evidence. The defendant requested the court to rule that the plaintiff must establish, not only that the goods were obtained through the fraud of Tufts, but also that the attaching creditor had knowledge thereof. This the court refused, and ruled that it was sufficient to prove fraud on the part of Tufts. Verdict for the plaintiffs, and the defendant alleged exceptions.

J. Q. A. Griffin, for the defendant.

I. W. Richardson, for the plaintiffs.

By Court, CHAPMAN, J. The fact that the testimony of a witness is contradicted does not authorize the party calling him to offer evidence that his general reputation for truth is good. Such evidence is admissible only when the opposite side has attempted to impeach his general reputation: *Russell v. Coffin*, 8 Pick. 142; *Jackson v. Etz*, 5 Cow. 320. An exception to this rule exists in England in the case of a deceased witness to a will. Evidence of his good character is admitted, even though none has been offered to impeach it: *Provis v. Reed*, 5 Bing. 435. The evidence in this case was properly excluded.

The authorities cited for the defendant to the point that a party may sometimes offer evidence of his own good character

are not applicable to this case. Joseph W. Tufts, jun., was not a party; he was only a witness. The fact that his fraudulent act was alleged did not alter his relation to this case so as to change the rule of evidence in respect to him. Where goods are obtained by fraud, the vendor may reclaim them against all persons, except a *bona fide* purchaser, without notice. An officer who takes them in behalf of creditors by legal process does not come within the exception. The cases cited by the plaintiffs' counsel establish this point. And see also *Rowley v. Bigelow*, 12 Pick. 312 [23 Am. Dec. 607]; *Bussing v. Rice*, 2 Cush. 48.

Exceptions overruled.

VENDOR MAY AVOID CONTRACT, AND RETAKE GOODS OBTAINED BY VENDEE BY FRAUD, unless they have passed into the hands of a *bona fide* purchaser for value: Note to *Hall v. Naylor*, 75 Am. Dec. 272; *Griffin v. Chubb*, 53 Id. 85; *Bidault v. Wales*, 59 Id. 327; *Fitzsimmons v. Joslin*, 52 Id. 46, and notes. And attaching creditors of the fraudulent vendee are not *bona fide* purchasers, and action lies against the attaching officer: Note to *Thurston v. Blanchard*, 33 Id. 704, 705. The principal case is cited to the point that an execution creditor does not become a *bona fide* purchaser by buying goods at a sale upon his execution, which were fraudulently purchased by the judgment debtor: *Devoc v. Brandt*, 53 N. Y. 466.

EVIDENCE OF WITNESS'S GOOD CHARACTER FOR TRUTH IS GENERALLY INCOMPETENT BEFORE IMPRACHMENT: *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 344, note 349. The principal case is cited to the point that in civil suits evidence of character is not admissible to rebut imputations of fraud or misconduct: *Boardman v. Woodman*, 47 N. H. 136.

FARNSWORTH v. HEMMER.

[1 ALLEN, 494.]

BROKER WHO ACTS FOR BOTH PARTIES IN EFFECTING EXCHANGE OF REAL ESTATE between them, without informing either that he is employed by the other, cannot recover from either commissions for his services; and evidence to show a custom among brokers to charge a commission to both parties in such cases is inadmissible.

CUSTOM OR USAGE TO BE LEGAL AND VALID MUST BE REASONABLE and consistent with good morals and sound policy.

CONTRACT by a real-estate broker to recover a commission for his services in effecting an exchange of lands between the defendant and Mrs. Cooper. It appeared in evidence that the plaintiff, who was a real-estate broker, was employed by the defendant to sell or exchange certain land in Boston, and that by his efforts an exchange was made with Mrs. Cooper for land

owned by her, which she had, before the defendant's employment of the plaintiff, employed the plaintiff in a similar manner to sell or exchange; that the plaintiff acted for both parties and charged a commission to both, and that an action by him against Mrs. Cooper to recover the commission charged to her had been commenced and was pending; that the plaintiff never informed the defendant of his employment by Mrs. Cooper, and there was no evidence that the defendant knew of it. The plaintiff offered to prove a custom among the brokers of Boston to charge a commission to both parties in cases like the present, and the defendant, in order to test the validity of such custom, admitted that it could be proved, but contended that it was a bad custom and legally invalid, and the court so ruled. A verdict was rendered for the defendant, and the plaintiff alleged exceptions.

G. D. Noyes, for the plaintiff.

E. M. Bigelow, for the defendant.

By Court, BIGELOW, C. J. The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them, respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do, where he acts for two persons whose interests are essentially adverse.

He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them: *Story on Agency*, sec. 31; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 204; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rupp v. Sampson*, 16 Gray, 398 [77 Am. Dec. 416].

Such being the well-settled rule of law, it follows that the evidence offered by the plaintiff was inadmissible. A custom or usage, to be legal and valid, must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfillment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents.

Exceptions overruled.

ACTS OF AGENT ARE NOT BINDING UPON PRINCIPAL, when agent's personal or representative interests are adverse to the principal: *Herman v. Martineau*, 60 Am. Dec. 368, and note 369.

REAL-ESTATE BROKER, WHEN ENTITLED TO COMPENSATION FROM BOTH PARTIES.—In *Herman v. Martineau*, 60 Am. Dec. 368, it was held that one employed by the owner of a farm to procure a tenant, but who has no discretion or control over the conditions of the letting of the farm, may recover for his services, though he received compensation from the tenant procured, since the interests of the parties whom he represents are not antagonistic as far as he is concerned, he having nothing to do with the conditions of the letting; and see the note to this case 370. But a broker acting for both parties in effecting an exchange or sale of property can recover compensation from neither, unless his double employment was known and assented to by both: *Rice v. Wood*, 113 Mass. 134; *Walker v. Osgood*, 98 Id. 350; *Bell v. McConnell*, 38 Ohio St. 400. And a real estate agent who acts as agent of both vendor and vendee, without the knowledge of the vendee, cannot recover compensation for his services from the vendee: *Meyer v. Hanchett*, 39 Wis. 423. But a real-estate broker may recover his commission where he acts as agent of both the vendor and purchaser with the authority or consent of the parties interested: *Alexander v. North Western Christian University*, 57 Ind. 476. The above cases cite the principal case. It is also cited to the point

that one cannot, without the consent of his principal, become the purchaser for his own use and benefit of property which is intrusted to him to sell: *Smith v. Townsend*, 109 Mass. 502.

EVIDENCE OF USAGE OR CUSTOM, WHEN ADMISSIBLE: See *Barlow v. Lambert*, 65 Am. Dec. 374, and note 379, collecting prior cases; *Cox v. Peterson*, 68 Id. 145. A custom which is unreasonable and unjust, or contrary to law or public policy, is not binding: *Steamboat Keystone v. Moies*, 75 Id. 123; *Barlow v. Lambert*, *supra*, and note; *Dickinson v. Gay*, 7 Allen, 34, citing the principal case. Thus a custom or usage will not be allowed to extend the right to act for and receive compensation from both parties to matters in which the interests of the parties are or may be diverse: *Walker v. Osgood*, 98 Mass. 352. So when a man gives an order to a broker "to buy stocks on margin," he employs the broker to act for him, and in his interest; the broker has no right to put himself in a position antagonistic to the interests of his employer; he cannot make himself both buyer and seller, and any custom to this effect, unknown to the employer, is against public policy, and illegal: *Commonwealth v. Cooper*, 130 Id. 288.

CARTWRIGHT v. BATE.

[1 ALLEN, 514.]

IT IS NOT NECESSARY THAT ONE FURNISHING NECESSARIES TO WIFE should know of the circumstances of the wife's separation from her husband at the time of their occurrence; but it is sufficient if at the time he supplies the necessities he has information of those circumstances, and they justify a furnishing of necessities on the credit of the husband.

HUSBAND SUED FOR NECESSARIES FURNISHED WIFE, WHOM HE HAS EXPELLED FROM HOME, is estopped from setting up in defense her subsequent marriage and conviction of bigamy therefor, if he intentionally misled her into a belief of his death and of her right to marry again.

ACTION to recover for necessities furnished defendant's wife. The opinion states the case.

W. C. Williamson, for the defendant.

M. G. Cobb, for the plaintiff.

By Court, CHAPMAN, J. This action is brought to recover six hundred and eighteen dollars for board, clothing, and money furnished by the plaintiff to the wife of the defendant, between May 1, 1854, and May 1, 1857. It appeared that the defendant was married to Georgiana Cartwright, a sister of the plaintiff, at London, in 1835. There was evidence tending to show that he treated her cruelly, and turned her out of doors without cause, and that she never has lived with him since; that afterwards, in December, 1838, he married another woman in England, and was indicted therefor and convicted of bigamy; that after serving out his sentence, he left Eng-

land with this woman, came to this country, and has lived here with her ever since; that after he turned his wife out of doors, she was supported for some time by the parish; and afterwards took care of herself for a while, and then returned to her father's; that in 1840, soon after the defendant came to this country, he procured a report to be made to her by his friends that he was lost on his passage, and was dead; that his family advised her to marry again, and they and she went into mourning on his account. She afterwards, by their advice, married one Caffrae, and lived with him as his wife for one or two years. After her marriage with Caffrae, the defendant visited England, and caused her to be indicted for bigamy. She was convicted and punished for the offense, and has never lived with Caffrae since, but has been supported in part by her brothers, of whom the plaintiff is one. She has never been in this country till she came at the request of the plaintiff to collect the account sued for in this action. At the time she separated from the defendant, the plaintiff was a child too young to have understood the circumstances.

The defendant moved for a nonsuit, on the grounds following, viz.: 1. That the plaintiff, being an infant at the time, could have had no knowledge, except from hearsay, of the cause of separation between the parties; and therefore, and for other reasons, he could not have depended on the husband's credit in furnishing to the defendant the supplies in question; 2. That there was no evidence that the necessaries and money were furnished on the credit of the husband; 3. That the wife must not only be innocent at the time of separation, in order to charge the husband, but that she must continue to be an innocent and chaste wife during the time while she is supplied with necessaries; and that Mrs. Bate having, after the separation, within a year or two from the time Bate left England, been guilty of bigamy, her husband, from that time, was discharged from the duty of maintaining her.

It is not necessary to discuss the question whether an order for a nonsuit, without the plaintiff's consent, could regularly have been made: See *Mitchell v. New England Ins. Co.*, 6 Pick. 117. The three grounds of the motion are all covered by the instructions which were given to the jury. These instructions were: "That if they found that the said Georgiana separated from her husband through his fault, and continued a chaste and virtuous wife, the plaintiff might recover in this action, if

he knew of the circumstances of her leaving her husband at the time he furnished the necessaries and gave credit to her husband, although he did not know of such circumstances at the time when they occurred; and if the jury believed that, at the time of her second marriage with Caffrae, she honestly believed that her first husband, the defendant, was dead, and had made all proper and needful inquiries before coming to such belief, and had done everything which she could reasonably be expected to do in the prosecution of such inquiries; and if they believed also that she had reasonable grounds for such belief, and was designedly misled by the defendant in the matter, or by other persons through his procurement—she had not thereby forfeited her right to a support by her husband, according to his station and degree.”

The court are of opinion that these instructions were correct. It was not material whether the plaintiff knew of the circumstances of the wife's separation from her husband at the time of their occurrence. None of the authorities cited for the defense sustain the position that the right to furnish supplies to a wife is limited to those persons who have knowledge of the affair at the time. If a husband expels his wife from home, and the fault is solely his own, she carries his credit with her to any person to whom she may see fit to apply. The authorities show that one who gives credit takes the risk of establishing a case against the husband, and that the burden is on him to prove his case. But if at the time he gives the credit he has such information as induces him to take the risk, it is enough.

And if the defendant caused his wife to be misled into a belief of his death, and of her right to marry Caffrae, he is estopped from taking advantage of her conduct. The instructions are carefully guarded, and are sustained by several of the authorities cited. The general doctrine is well stated in *Pickard v. Sears*, 6 Ad. & El. 469: “Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time.” See also *Dewey v. Field*, 4 Met. 881 [38 Am. Dec. 376].

An objection was taken in the argument that the plaintiff cannot recover for money furnished to the wife. It appears by the deposition of the plaintiff that a part of his claim is

for money furnished to the wife as she was about to sail for America; but whether the verdict includes this money does not appear. The verdict is for a much less sum than that claimed in the writ. No instructions were given on this point, and none were asked for; and therefore it does not properly come before this court. There are many cases where the rule would be very harsh, as stated in *Earle v. Peale*, 1 Salk. 387, namely, that a party cannot recover for money furnished to a married woman living separate from her husband on account of his fault, although it was to lay out for necessities; but it is not necessary to decide the question here.

Exceptions overruled.

HUSBAND'S DUTY TO SUPPORT WIFE: *Norcross v. Rogers*, 73 Am. Dec. 322, and note citing prior cases 326. The principal case cited to the point that a person dealing with a married woman living separate from her husband does so at his own peril, the presumption of law being the husband is not liable, and the circumstances fixing his liability must be shown by the party seeking to charge him: *Hare v. Gibson*, 32 Ohio St. 38.

FESSENDEN v. WILLEY.

[2 ALLEN, 67.]

DISCHARGE UNDER INSOLVENT LAWS OF MASSACHUSETTS IS NO BAR to an action upon a promissory note given in such commonwealth, payable at no particular place, but indorsed to a citizen of another state before the commencement of the proceedings in insolvency, although not indorsed until after it became due.

ACTION by a citizen of Maine upon three promissory notes, payable to the order of Covell, Steele, & Co., and by them indorsed. The defendants, makers of the notes, were residents of Massachusetts. The notes were dated and payable respectively as follows: the first, October 1, 1853, payable in sixty days; the second, October 8, 1853, payable in six months; the third, October 15, 1853, payable in sixty days. Of the firm of Covell, Steele, & Co., Covell lived in Maine, and the other members of the firm resided in Massachusetts, their place of business being in Maine. This firm on January 1, 1854, sold and delivered the notes to W. P. Greenough, the first one only having been indorsed by them. In April, 1856, Greenough sold and delivered them to the plaintiff, indorsing the name of the firm of Covell, Steele, & Co. on the two which had not been indorsed, he having authority so to do. Proceedings in

Insolvency were instituted by the defendants in June, 1856, and in January, 1857, they received their discharge. Upon the agreed facts as above, judgment went for the plaintiff. Defendants appealed.

J. F. Pickering, for the defendants.

A. G. Burke, for the plaintiff.

By Court, DEWEY, J. Had these promissory notes been made payable to the order of Hiram Covell alone, he being a citizen of Maine, we suppose no question could have been made as to the right of the plaintiff to recover in this action, notwithstanding the proceedings in insolvency and the discharge granted to the defendants. It would have been the familiar case of a contract to pay money to a citizen of another state, and which has been so often held not to be affected by a discharge of the debtor under the insolvent law of Massachusetts: *Savoie v. Marsh*, 10 Met. 594 [43 Am. Dec. 451]; *Dinsmore v. Bradley*, 5 Gray, 487.

These notes were not made payable at any particular place, and were therefore, in contemplation of law, payable to the holder at his place of residence. We do not think that the omission by Covell, Steele, & Co. to make a formal indorsement of the last two of the notes to Greenough, at the time of the sale and delivery to him, varies the case; because the subsequent indorsement, if made in pursuance of authority to that effect, given at the time of the sale, would confer the same rights upon the holder as if the same had been made previously: *Ranger v. Cary*, 1 Met. 377.

With regard to the other note, we perceive nothing to distinguish it from the well-settled cases of a note payable to order and indorsed to a citizen of another state, to whom it then becomes payable, and is thereby protected from the effect of a subsequent discharge of the maker under the insolvent laws of Massachusetts. The difference between the third note and the others arises from the fact that the latter did not become the property of W. P. Greenough until after they had become due and payable. One of them was, however, indorsed by the payees before due, though not sold to Greenough until thirty days after it became due, and the other was not indorsed or sold until it was overdue fifteen days.

We are not aware that these facts affect the character of these notes, as to their being exempted from the effect of a discharge under the insolvent laws of this commonwealth.

The cases that have arisen have usually been those of notes transferred to a citizen of another state before due. But we do not perceive any sufficient ground for taking a distinction in the present case on that account. The period elapsing was at most thirty days only. It is true that this would let in all equitable defenses of payment, set-off, and the like, founded upon facts taking place before the transfer. But the present defense is not of that character: *Isley v. Merriam*, 7 Cush. 242 [54 Am. Dec. 721]. These notes were made payable to order, and of course transferable after due as well as before; and if not paid, and no equitable defense exists in respect to them, may be enforced in the name and for the benefit of an indorsee. There is nothing in the case to show that this transfer was made to Greenough to avoid the effect of an anticipated discharge of the maker under the insolvent law. But the contrary may reasonably be inferred from the fact that the transfer to Greenough was on the first of January, 1854, and the defendants did not become the subjects of proceedings in insolvency until June 1856, a period of more than two years subsequent to the transfer.

These notes having been thus in the hands of Greenough from the first of January, 1854, were, in April, 1856, transferred to the plaintiff, who succeeded to the rights of Greenough. This transfer to the plaintiff was also previous to the institution of proceedings in insolvency by the defendants.

Upon these facts, we are of opinion that it must be held that these notes constitute a contract with a citizen of another state, creating a debt due to him, and one not to be affected by the discharge of the defendants under the insolvent laws of Massachusetts.

2. A further ground relied upon by the plaintiff is that this discharge would furnish no defense, even if Covell, Steele, & Co. were the plaintiffs in this action; because Covell, one of the members of that firm, was then, and has ever since been, a resident and citizen of the state of Maine, and under our decisions, a note given to a citizen of Maine would not be affected by a discharge of the maker in insolvency in this state. The case is complicated by the fact that the other parties are citizens of Massachusetts. But to give effect to the discharge, we should, in that case, directly affect a contract to which a citizen of Maine is a party, being one of several persons jointly interested. The inquiry would be whether in such case the maker of the note would have a right to set up the discharge,

when it might thus affect a citizen of another state. As we think this defense of a discharge is sufficiently answered by the other view we have taken of the case, it is unnecessary to express any opinion upon this second point.

Judgment for the plaintiff.

WHAT DEMANDS MAY BE DISCHARGED UNDER STATE INSOLVENT LAWS: See note to *Norton v. Cook*, 23 Am. Dec. 347 et seq., discussing the point decided in the principal case, as well as other questions under this head; and see *Hollister v. Abbott*, 64 Id. 342, and cases cited in note 343.

THE PRINCIPAL CASE IS CITED in *Guernsey v. Wood*, 130 Mass. 503, to the point that a discharge in insolvency is not a bar to an action on a contract by a citizen of another state, and it is there held that the rule is applicable in a suit by such non-resident, though the contract had been made between the defendant and one who was plaintiff's agent, but who at the time of the contract did not disclose his agency, both being residents. The principal case is also cited in *Brighton Market Bank v. Merick*, 11 Mich. 413, to the point that for all purposes within the rules applicable to insolvent discharges, as affecting non-residents, the rights of an indorsee are the same as if he had been named as payee in the note. If the discharge would not have affected his rights as a non-resident in the one case, it will not in the other.

INCHES v. DICKINSON.

[2 ALLEN, 71.]

ADMINISTRATOR OF LESSEE WILL BE HELD TO HAVE ENTERED AND TAKEN POSSESSION OF PREMISES, and will be personally liable to the lessor for the rent thereof, until his estate therein is terminated by a notice to quit, to the extent of the real value of the premises, where he fails to quit and surrender the demised premises immediately after his appointment, or upon notice to quit, until a judgment for the possession thereof has been obtained against him; but, instead, keeps the property of his intestate there for several weeks, sells it by auction upon the premises, and claims of an under-tenant of part of the premises rent which accrued after his intestate's death.

ACTION on contract. The opinion states the facts.

G. Bancroft, for the defendant.

C. A. Welch, for the plaintiff.

By Court, BIGELOW, C. J. The rule of law is well settled that an executor or administrator of a lessee is liable for rent of demised premises only to the extent of the assets in his hands, and cannot be held personally therefor, unless he enters and holds possession of the estate after the death of the lessee. In the latter case, he is chargeable as assignee, in respect of the perception of the profits, and liable for the rent *de bonis*

proptis. Inasmuch as in law the profits of an estate under a demise are deemed to be appropriated to the lessor, if an executor or administrator enters during a current quarter, and takes the profits from an under-tenant or otherwise, the rent becomes his personal debt, and he is liable for the rent for that quarter, to the extent of the value of the premises, although it commenced before the death of the lessee: *Bailiffs etc. of Ipswich v. Martin*, Cro. Jac. 411; *Jevens v. Harridge*, 1 Saund. 1; *Dean of Bristol v. Guyse*, Id. 111; *Buckley v. Pirk*, 1 Salk. 317; *Wollaston v. Hakewill*, 3 Man. & G. 297, 320.

The application of these well-established principles is decisive of the liability of the defendant in this action. On the facts agreed, there can be no doubt that he has made himself liable to be charged personally, as assignee of the lease. He did not quit and surrender the premises immediately after his appointment; he continued in their occupation, and kept the property of the intestate there for several weeks, and sold it at auction on the premises in the month of January; he claimed to recover rent of the under-tenant of his intestate for four months preceding the first of February, and did not deliver up the premises to the plaintiff until after a judgment against him, as holding the premises without right, after the determination of his tenancy, as assignee of the lease, by a notice to quit for non-payment of rent. Upon these facts, it cannot be contended that the defendant did not enter and take possession of the demised premises, and hold and enjoy the same so as to render himself liable to be charged personally as assignee of the lease.

As has been already stated, the defendant is liable to some extent for rent during the quarter which had not expired at the time of the death of the lessor. He is also chargeable until his estate was determined by the notice to quit. After that, he held the premises as tenant by sufferance, and is not chargeable for rent as assignee of the lease. But he is not absolutely liable for the amount of the whole rent reserved by the lease, but only to the extent of the value or real worth of the use of the premises. As he is made responsible personally solely by virtue of his entry and possession, and not in the covenants of his intestate contained in the lease, the law holds him for so much of the rent only as the premises are actually worth. *Prima facie*, the rent reserved by the lease is evidence of the value of the premises, and of the extent of the liability of the administrator, but it is open to him to show that the estate,

during the time for which he is liable, was of less value, and for that amount only can he be charged in this action: *Rubery v. Stevens*, 4 Barn. & Adol. 241; *Hornidge v. Wilson*, 11 Ad. & El. 645; *Hopwood v. Whaley*, 6 Com. B. 749. If the parties cannot agree on the sum for which judgment is to be entered, the case must go to an assessor to ascertain the amount, and on the coming in of his report, the entry will be judgment for the plaintiff.

ACTION FOR USE AND OCCUPATION, WHEN LIES: See note to *Fitzgerald v. Beebe*, 46 Am. Dec. 289, 290.

THE PRINCIPAL CASE IS CITED IN *Deane v. Caldwell*, 127 Mass. 247, to the point that a recovery against the administrator of a lessee for the value of his own use and occupation will not, beyond the satisfaction so received, affect the rights and remedies of the lessors upon the covenants of the lease.

RICHARDSON v. CITY OF CAMBRIDGE.

[2 ALLEN, 118.]

DEED OF MORTGAGE CONVEYING ALL LAND, AND RIGHT AND CLAIM TO LAND, which the grantor has in the town of Cambridge, does not include land therein to which he has only a possibility of a reversion, on the non-performance of a condition subsequent.

PRESUMPTION IS THAT NOTE SECURED BY MORTGAGE OF REAL ESTATE WAS PAID according to its terms, and the estate of the mortgagee is defeated thereby, if there is no evidence of the time of payment, but the note is found among the mortgagor's papers after his death; and if, after the death of both the mortgagor and mortgagee, the heirs of the mortgagor bring a suit against the heirs of the mortgagee to redeem the mortgage, being in ignorance of the facts, the fact that upon finding the note a settlement is made by which the note is given up to the latter will not have the effect of reviving the mortgage.

PETITIONER IN PARTITION PROCEEDINGS ALLEGING that a certain share of the premises is owned by persons therein described, who in fact are not the owners thereof, is not prevented thereby from subsequently purchasing such share from the true owner, and making a valid conveyance thereof, though the partition be made in accordance with the allegations of his petition.

PETITION for partition of land. The opinion states the facts.

W. L. Burt, for the petitioners.

J. C. Dodge, for the respondents.

By Court, CHAPMAN, J. The lot described in the petition is known as the meeting-house lot. It is about seventeen rods in length, and eight rods in breadth, and is bounded by sev-

eral streets in Cambridge. The petitioners are the heirs of Newell Bent, late of Cambridge, deceased, and claim under a mortgage deed made to him by Rufus Davenport, dated November 1, 1827, which they say includes this lot. The condition of the mortgage is, that if the grantor, his heirs, etc., shall pay to the grantee, his heirs, etc., a note of six thousand dollars on demand with interest, the deed and note shall both be void. The property mortgaged includes many particulars. The deed describes a great number of tracts of land by reference to other deeds. It also includes all the grantor's pews in the meeting-house then standing on the lot, which are designated by their numbers. If the meeting-house lot is included in the mortgage, it is by the following clause:

"And I, the said Rufus Davenport, do hereby give, grant, sell, and convey unto the said Newell Bent, his heirs and assigns, all (except as hereinafter excepted) of the land, and right and claim to land, which I, the said Rufus, now have in the towns of Cambridge and Charlestown, in the said county of Middlesex, and of the pews, and right and claim to pews, in the said Cambridgeport meeting-house, including all right to redeem such land and pews, and all privileges and appurtenances thereunto belonging, whether the same be or be not included in the deeds and numbers of pews referred to or described in this deed. The premises being subject to a number of previous mortgages, I, the said Rufus, make no warranty hereby against incumbrances on the premises."

The first question to be considered is whether this clause includes the meeting-house lot.

The title to the lot was then in the Cambridgeport parish, under a deed from the Cambridgeport Meeting-house Corporation, dated February 18, 1809. The grantors held it under the deed of Rufus Davenport to Royal Makepeace and four other persons, dated April 26, 1806. These parties held it under a deed from Andrew Boardman and others, dated April 15, 1806. Boardman's deed recites that whereas he had previously sold certain lands to Davenport, and certain other lands to Makepeace, and had covenanted with them that he would 'ay out a square or piece of land for a meeting-house lot, he therefore conveys this lot to these grantees, their heirs and assigns, to hold in certain proportions in common, with warranty. The deed of Davenport, Makepeace, and their associates is in consideration of friendship and good-will to the Cambridgeport Meeting-house Corporation, and conveys the lot

to the corporation, its successors and assigns, "on the conditions and for the purposes hereafter mentioned, and no other. The said corporation shall have a right to keep and continue a meeting-house thereon, where the one now building stands," etc. Assuming that this conveyance was conditional, it was on a condition subsequent; and when the condition should be broken, it would give the grantors a right of entry for the breach. At the time of Davenport's mortgage to Bent, the condition had not been broken. The grantees of the corporation had a meeting-house upon it, which was the same house that contained the pews mentioned in the mortgage. The house remained, and was used for religious worship till 1833. The interest which Davenport then had in the lot was a mere possibility of reversion, as to his individual share. If any of the words of the clause above cited include this interest, they are the following: "All the right and claim to land which I, the said Rufus, now have in the towns of Cambridge and Charlestown." The following words of the clause, viz., "including all right to redeem such land and pews," refer to such land and pews as were covered by mortgages, and this lot was not in that situation. At that time he had no right or claim to this land; and it was not certain that he ever would have any. Therefore the words, "all the right and claim to land which I now have," do not include this land by their fair and natural import. They have a more limited meaning than the usual phrase which is adopted for the purpose of conveying all rights of every description, namely, "all my right, title, and interest in and to," etc. As this was a mortgage, the object of which was to secure a note payable on demand, there is less reason for giving the words an enlarged construction than if it had been an absolute deed, the apparent object of which was to transfer all his interest in any and all real estate situated in the towns named. Regarding, then, the words of the mortgage as not broad enough to convey a possibility of a future right of entry for forfeiture, the petition must fail on this ground.

But if the mortgage had included this lot, there is another fact which is fatal to the petitioners' claim. It does not appear when or how the note was paid; but after the death of the mortgagor, it was found among his papers. The presumption arising out of this fact is that it was paid according to its terms; that is, that it was paid when demanded. If it was so paid, the estate of the mortgagee thereupon expired by its own

terms, and the mortgagor was in of his old estate. No release of the mortgage was necessary, and no equity of redemption existed: *Holman v. Bailey*, 3 Met. 55.

It appears that after the decease of Davenport and Bent a suit was brought by the heirs of Davenport against the heirs of Bent to redeem; but upon the note being found among the papers of Davenport, a settlement was made by which the heirs of Bent were to take all the mortgaged property, except the meeting-house lot, and pay the heirs of Davenport the sum of six thousand dollars. Newell Bent the younger, and Joseph Porter and wife (the wife being a sister of Bent the younger), made a quitclaim of the meeting-house lot to Henry Davenport, the son of Rufus, dated February 23, 1844. A release by the minor heirs of Bent was talked of, but it was not considered necessary. Davenport's heirs released the other lands to Bent's heirs, and to strengthen the title, or to revive a title under the mortgage, the six-thousand-dollar note was given to Bent's heirs. As it was a part of the agreement that Bent's heirs should not have the meeting-house lot, the petitioners are without equity. Nor would they gain any legal title by virtue of the return of the note to them. This act would not revive the mortgage, which had been extinguished in the lifetime of the mortgagor.

The petitioners also claim under a deed from John Tarbell, a deputy sheriff, by which, in January, 1828, he conveyed to Newell Bent all Davenport's right in equity of redeeming the real estate described in the mortgage above referred to; but of this they cannot avail themselves: 1. Because it did not include the meeting-house lot; and 2. Because there does not appear to have been any existing equity of redemption when the deed was made. And if there was such an equity existing at the time, Bent suffered the mortgage to be discharged by giving up the note, and did not in his life-time assert any right to such equity. There is no occasion, therefore, to consider the objections to the sale of Tarbell on account of formal defects.

The proceedings upon the petition for partition in 1837 did not bind the heirs of Davenport, because they were not parties, and had no opportunity to become parties. Fisk and Rice were the petitioners, and Mason and the heirs of Newell Bent were the respondents. And though the judgment was conclusive as to all the then existing rights of the parties, by the revised statutes, chapter 103, section 83, yet it did not operate

as a warranty upon rights to be acquired afterwards. The language of the statute refers only to the present rights of parties as being concluded. If there were better titles outstanding in third persons, they were unaffected by the proceedings. The arrangement was afterwards made by which the heirs of Davenport were to give up the six-thousand-dollar note to the heirs of Bent, and execute the quitclaim deed of all the mortgaged property except the meeting-house lot. This quitclaim is dated December 9, 1843, and the quitclaim of Bent the younger and Porter and wife to the meeting-house lot is dated February 23, 1844. Since that arrangement was made, there has been no adverse possession of the meeting-house lot by any of Bent's heirs; and the title of Davenport's heirs might well be conveyed to Fisk, and by him to the respondents. Thus it appears that the petitioners have not acquired title by estoppel or by adverse possession. They have therefore failed to establish any title to any portion of the premises.

Judgment for respondents.

THE PRINCIPAL CASE IS CITED in *Merrill v. Chase*, 3 Allen, 339, to the point that by the performance of the condition of a mortgage, the title of the mortgagor is defeated, and the mortgagor is in his former estate; and in *Merrill v. Harris*, 102 Mass. 328, to the point that the assignment of a mere mortgage title cannot have the effect of an absolute alienation in fee to convey or extinguish the right of entry for breach of that condition.

FOLEY v. WYETH.

[2 ALLEN, 151.]

OWNER OF LAND MAKING EXCAVATION SO NEAR TO ADJOINING LAND of another as to cause the soil of the latter to break away is responsible for all injury thereby occasioned to the land, and also for the disturbance of a right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation, but not for injury to buildings which have been placed upon the land.

ONE IN OCCUPATION OF LAND UNDER AGREEMENT IN WRITING TO PURCHASE, where such agreement contains no stipulation that he may have possession until the price is paid, is a mere tenant at will, and cannot maintain an action for injury to the reversion, although he subsequently becomes the owner of the land in fee.

IN ACTION FOR INJURY TO PLAINTIFF'S LAND FROM EXCAVATION by defendant on his adjoining land, whereby plaintiff's soil has broken away and fallen, the fact that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land, is no defense.

ACTION for damages. The opinion states the facts.

H. F. Smith, for the defendant.

B. Dean, for the plaintiff.

By Court, MERRICK, J. The declaration alleges that the plaintiff was seised and possessed of the parcel of land described therein, together with a right of way in common with other persons; in two passage-ways adjoining and appurtenant thereto; and that the defendant dug a large and deep pit in her own land, whereby a considerable portion of his land caved in and was removed, and the said passage-ways were made useless and impassable. And from the statement of facts reported, it appears that the plaintiff had contracted in writing to purchase the premises for a valuable consideration to be subsequently paid, and that in the mean time he was in the possession and occupation of the premises by the license of Erastus Hutchinson, the owner with whom the contract of sale was made. Proof of the alleged excavation and injury to his land and passage-ways having been adduced by the plaintiff, the presiding judge ruled that this was sufficient to entitle him to maintain his action, and that for this purpose it was not incumbent on him to show also that the excavation was made by the defendant in a careless, negligent, and unskillful manner.

This ruling was correct. If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away and falls into the pit, he is responsible for all the damage thereby occasioned. Few principles of the law can be traced to an earlier or to a more constant recognition, through a long series of uniform and consistent decisions, than this. It is distinctly stated in 2 Roll. Abr. 564. In *Gale & Whatley on Easements*, 215, it is said that "the right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to artificial pressure by means of buildings or otherwise." In the former case, the right is not an easement, but is a right of property as being necessarily and naturally attached to the soil: *Id.* 216. And in the recent case of *Humphries v. Brogden*, 12 Ad. & El., N. S., 739, where the law upon the subject appears to have been fully and carefully investigated and considered, it is affirmed that the right to lateral support from the adjoining soil is not like the support of one building upon another, supposed to be

gained by grant, but is a right of property which passes with the soil, so that if the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the support of the other close the very instant when the conveyance is executed. "And this doctrine," said Lord Campbell, C. J., after an examination of the authorities in which it is recognized, and by which it is sustained, "stands on natural justice, and is essential to the protection and enjoyment of property in the soil." The same principle is asserted by this court in the opinion given by Parker, C. J., in the case of *Thurston v. Hancock*, 12 Mass. 220 [7 Am. Dec. 57]. The decision in the case of *Lasala v. Holbrook*, 4 Paige, 169 [25 Am. Dec. 524], is to the same effect; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195 [53 Am. Dec. 357]; *Richardson v. Vermont Central R. R.*, 25 Vt. 465 [60 Am. Dec. 283]; *Solomon v. Vintners' Co.*, 4 Hurlst. & N. 585. It is a necessary consequence from this principle, that for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done, and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care, or skill, or positive negligence has contributed to produce it.

The jury were therefore correctly advised that if the defendant, by excavations in her own land, and by carrying away large quantities of earth and clay therefrom, caused the adjoining land to fall and sink into the pit which she had dug, she was liable for the injury done to the soil of the plaintiff; and that this action might be maintained to recover damages for the interruption and disturbance of his right of way in the passage-ways, as well as for depriving him or lessening the value of the use of the land to which they were appurtenant. But it was erroneous, in the absence of any proof of carelessness, negligence, or unskillfulness in the execution of the work,

to add that they might take into consideration, as an element of damage for which compensation could be recovered, the fact that the foundation of his house had been made to crack and settle.

In reference to the question of damages, the court also instructed the jury that the plaintiff was not a mere tenant at will, but was a tenant under a written contract, with a right to continue in possession so long as there was no failure on his part to perform all that was required by his contract with Hutchinson. This instruction cannot be sustained. No demise was created by that contract; and the plaintiff held possession of the premises only by permission of the owner. Although, under the circumstances stated, it was undoubtedly the intention of the parties that he should remain in the undisturbed possession of the land unless he neglected to make the stipulated payments, he had no title by which he could hold it against the owner for any fixed or definite length of time. He was therefore a mere tenant at will: *Gould v. Thompson*, 4 Met. 224. And Hutchinson, as the owner in fee, was the proper party to seek for a remedy for injuries to the reversion: *Hastings v. Livermore*, 7 Gray, 194. The rights and liabilities of all the respective parties can only be considered in an action for the recovery of damages, as they existed at the time when the wrong was committed. They were in no degree affected by a subsequent conveyance of the estate.

The defendant excepts to the refusal of the court to instruct the jury, in conformity to his request, that if the injury complained of was in any degree caused by or would not have occurred but for the additional weight of buildings erected on their land by persons other than the plaintiff, he could not recover in this action. But this instruction was properly withheld. Whether, if the pressure of the weight of artificial structures which the owner has placed upon his own land for a lawful purpose and in its reasonable use contributes to cause a slide or crumbling away of his soil into a pit excavated in an adjoining close by another proprietor, this will deprive him of the right to remuneration for the injury sustained, may be considered to be at least open to denial. It may be determined when the precise question arises. It does not arise here. But as to the much broader proposition asserted by the defendant in her request, we think there is no room for doubt. The absolute and unqualified right of property which vests in the owner of land cannot be diminished or lawfully affected

by the acts or proceedings of strangers in the use and appropriation of that which belongs to them; and therefore he who, in the execution of an enterprise for his own benefit, changes the natural condition of the parcel of territory to which he has title, and thereby takes away the lateral support to which the owner of the adjoining estate is entitled, cannot exonerate himself from responsibility by showing that the particular injury complained of would not have occurred if other persons had never made alterations in or improvements upon their respective closes: *Brown v. Robins*, 4 Hurlst. & N. 186. His right of dominion over his own land is not without some limitations. To make a justifiable use of his own, he must have a proper respect to the appropriation which has already been made by other owners of the surrounding territory. And therefore when one undertakes to make an excavation on his land, he must consider how it will be likely, in view of the existing and actual occupation of others, to affect the soil of his neighbor.

For the reasons stated, it is apparent that the verdict cannot be affirmed for the sum which the jury have found as the damages sustained; and accordingly it must be set aside and a new trial granted.

RIGHT TO LATERAL SUPPORT, AND LIABILITY IN DAMAGES FOR INJURY CAUSED BY EXCAVATION in adjacent lands: See *Thurston v. Hancock*, 7 Am. Dec. 57, and exhaustive note thereto 63-66; *Lasala v. Holbrook*, 25 Id. 524; *Richardson v. Vermont Cent. R. R. Co.*, 60 Id. 283; *McGuire v. Grant*, 67 Id. 49, and cases cited in the notes. The principal case is cited to the point that the owner of land may recover of the adjoining owner for damages caused to the soil of the former by an excavation on the lands of the latter, without proof of negligence or want of skill; but to recover for injury to the buildings, negligence or want of skill in the excavation so as to cause the injury must be clearly shown: *Quincy v. Jones*, 76 Ill. 241; *Hartshorn v. Worcester County*, 113 Mass. 114; *Gilmore v. Driscoll*, 122 Id. 204-206, 208; *Keating v. Cincinnati*, 38 Ohio St. 149.

TENANT AT WILL OF LAND MAY SUSTAIN ACTION FOR INTERRUPTION OF PASSAGE-WAY appurtenant to the land occupied by him: *Foley v. Wyeth*, 2 Allen, 136, citing the principal case, and arising out of the same facts.

COMMONWEALTH v. WEYMOUTH.

[3 ALLEN, 144.]

JUDGE OF SUPERIOR COURT HAS POWER TO REVISE AND INCREASE SENTENCE imposed upon a convict, during the same term of court, and before the original sentence has gone into operation, or any action been had upon it.

HABEAS CORPUS. Defendant, after a plea of guilty to an indictment for larceny, was sentenced to imprisonment in the house of correction for two years, but before service or execution of the warrant, though after issue thereof, and on the same day of the sentence, the court ordered the execution of the sentence stayed, until further hearing. On the next day, the prisoner was sent to the bar, and the attorney for the commonwealth moved for a revision of the sentence, against which the prisoner protested. After hearing testimony, the court ordered the previous sentence revised, and that the defendant be punished by imprisonment in the state prison for three and a half years, the first two days of which were to be solitary.

C. H. Hudson and B. F. Russell, for the prisoner.

Foster, attorney-general, for the commonwealth.

By Court, BIGELOW, C. J. We are not called upon, in the present case, to express any opinion concerning the wisdom or expediency of the course adopted by the court below, in revising and changing a sentence, which had been formally promulgated and pronounced on a convict. The presumption is that there were sufficient reasons addressing themselves to the sound judicial discretion of the court for such action, and that it was deemed to be necessary in furtherance of justice and the due administration of the law. The single question which we have to determine is, whether, upon the record as certified to us, there is any such irregularity or illegality as to entitle the petitioner to be discharged from the imprisonment to which he is now subjected, under and by virtue of the judgment and sentence of that court.

It seems to have been recognized as one of the earliest doctrines of the common law that the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered. It is said by Lord Coke, in Co. Lit. 260 a: "Yet during the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore

the rule is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment, or proof to the contrary." This statement of the rule of law is substantially followed by subsequent text-writers of high authority: Com. Dig., tit. Record, F; Bac. Abr., tit. Sessions of Justices; 2 Gabbett's Crim. L. 564. In 1 Ch. Crim. L. 722, it is stated thus: "In case of misdemeanors, it is clear the court may vacate the judgment before it becomes matter of record, and may mitigate, or pass another, even where the latter is more severe; and the justices at sessions have the same power during the session, because it is regarded as only one day." That this power has been often exercised by the courts in England is manifest from cases in which it appears that judgments and sentences, during the same term in which they have been entered, have been vacated, and others substituted, without doubt or question: *Regina v. Fitzgerald*, 1 Salk. 401; *Turner v. Barnaby*, 2 Id. 567; *King v. Price*, 6 East, 327; *King v. Justices of Leicestershire*, 1 Mau. & Sel. 444; *Darling v. Gurney*, 2 Dowl. Pr. 101.

The authority thus exercised is probably founded on the practice by which the record is not finally made up until the end of the term or session of the court, when "the roll," as it is called, is signed and returned. Until then, it remains in the control of the court, and no entry therein is deemed to be final or beyond the power of the court to amend or alter it, either for error or other sufficient cause. The practice in this commonwealth has been substantially in accordance with the rule of the common law, as stated in the authorities above cited. It has been varied only so far as to adapt it to the different forms and modes of doing business in our courts. During the term, no record, in the strict meaning of that word, is kept of the doings of the court. Its proceedings are noted by the clerk from day to day in brief minutes upon the docket, and from these the extended record is drawn up after the final adjournment for the term. The memoranda thus made have always been subject to such alterations during the term as might be deemed by the court necessary or proper, either by correcting mistakes or by substituting a different entry or judgment from that originally made. Nor is this the extent of the power of the court over its records. Upon due proof that some error has been made in drawing up the record, amendments have been allowed after the final entry of judgment and the adjourn-

ment of the court for the term: *Tilden v. Johnson*, 6 Cush. 354; *Balch v. Shaw*, 7 Id. 282; *Fay v. Wenzell*, 8 Id. 315. In *Stickney v. Davis*, 17 Pick. 169, this court allowed a judgment to be vacated after the expiration of a year from its rendition, and a new one to be substituted. The power of the court to allow such amendments, and the due and proper limitation on its exercise, are there stated and accurately defined. The rule is declared to be, that if it clearly appears that no action has been had on the judgment, or the execution, if one has been issued, has been returned to the files unexecuted, and where the rights of third persons, not parties to the suit, cannot be affected, there is no good reason for refusing to vacate a judgment for sufficient cause, and substituting a new one in its place. This is certainly a safe and reasonable exercise of judicial discretion, which cannot be used to abridge or infringe upon the rights of any one: not on those of the parties to the suit, if a legal and regular judgment only is rendered; nor of third persons, because it cannot be exercised if it operates to their prejudice or injury. The application of this doctrine to the present case is decisive against the claim of the petitioner to his discharge. It is not contended that the court has any less power or control over its records in a criminal case than in one which affects the parties *civiliter* only. Certainly there is no ground for any such distinction.

The true test by which to determine whether the power can be executed is to ascertain whether it will affect the legal rights of the parties. If it will not, then it is a legitimate exercise of judicial discretion of which no one has a right to complain. The petitioner in the present case is not subjected by the amended sentence of the court to any punishment for his offense other or greater than that allowed by law. He was never taken or charged on the warrant which was issued on the sentence as originally pronounced. That sentence never went into operation, and in effect, was the same as if it had never been passed. So long as it remained unexecuted, it was, in contemplation of law, in the breast of the court, and subject to revision and alteration. He was not injured or put in jeopardy by it any further than he would have been by a conclusion or judgment of the court as to the extent of his punishment, which had not been announced. Until something was done to carry the sentence into execution, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he was entitled was taken away or invaded by revok-

ing the sentence first pronounced and substituting in its stead the one under which he now stands charged. If it had appeared that the petitioner had actually been taken and committed under the first sentence, or if he had been thereby condemned to imprisonment in the state prison, so that the term of his sentence would be computed from the time he was first ordered to remain in the custody of the sheriff, according to the statutes of 1859, chapter 248, we might have arrived at a different result; but on the record as it stands, we are all of opinion that the order must be, prisoner remanded.

POWER OF COURT TO REVISE OR AMEND SENTENCE. — The sentence in a criminal case, as a general proposition, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session: Wharton's Crim. Pl. & Pr., sec. 913; *Rea v. Fletcher*, Russ. & Ry. 58; *Regina v. Fitzgerald*, 1 Salk. 400; prior to the time that any act is done in execution of the sentence: *Commonwealth v. Foster*, 122 Mass. 323, citing the principal case; *Brown v. Rice*, 57 Ma. 57; and particularly when the court is requested by the defendant to reconsider its sentence with a view to its modification: *Jobe v. State*, 28 Ga. 235; and if the court vacate the judgment, it may mitigate the sentence, or pass one more severe; and the power to do so at the same term is based on the fact that the term of court is considered as one day or session: *Lee v. State*, 32 Ohio St. 115, citing the principal case; 1 Ch. Crim. L. 722; *Rea v. Price*, 6 East, 327. In *Ex parte Lange*, 18 Wall. 163, 194, citing the principal case, the court say that "the general power of a court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable, and this is the extent of the proposition intended to be decided in the case of *Bassett v. United States*, 9 Wall. 38."

In *People v. Thompson*, 4 Cal. 238, where the court after sentencing the prisoner, but before signing final judgment, had the prisoner brought before it, and amended the sentence by shortening the time, this was held not to be error. Where, by inadvertence, a requirement of the statute had been overlooked in passing sentence, it was held that the court might correct the judgment at the same term and before the sheriff had proceeded to execute it, and that such correction could be made by expunging or vacating the first sentence and passing a new sentence: *Miller v. Finkle*, 1 Park. C. C. 374. Thus, where a court sentenced a prisoner to a less term of imprisonment than authorized by law for the offense of which he was convicted, it was held that the court properly corrected the error and sentenced him to the shortest period fixed by statute for such offense: *Logan's Case*, 5 Gratt. 692. The effect of vacating a sentence and pronouncing a new sentence at the same term is the same upon the civil rights of the defendant as if the first judgment had been reversed on error and the defendant had been again convicted on a second trial: *Miller v. Finkel*, 1 Park. C. C. 374.

But it is held that the court cannot amend or revise its sentence after it has adjourned without day: *Commonwealth v. Foster*, 122 Mass. 323; or at a subsequent term: *Commonwealth v. Malloy*, 57 Pa. St. 291; *McCarthy v. State*, 56 Miss. 295. Nor has it any power over the sentence after commission of

the prisoner to jail, or other execution of the sentence at the same or a subsequent term: *Commonwealth v. Foster*, 122 Mass. 323; *McCarthy v. State*, 56 Mass. 295; *Brown v. Rice*, 57 Me. 55; *In re Hartwell*, 1 Low. 537, citing the principal case; *People v. Duffy*, 5 Barb. 205; *People v. Brown*, 23 Wend. 47; although in *Bassett v. United States*, 9 Wall. 39, it was held that the court had power during the same term, for proper cause, to set aside a judgment rendered on confession after the defendant had entered upon the imprisonment ordered by the sentence. In such case, the original indictment would be still pending, and a bail bond for the prisoner's appearance given thereafter would be valid. The decision in this case is apparently contrary to the general tenor of the decisions of the state courts, but it is possible that the reason of the decision lies in the fact that the judgment was one by confession; for the constitutional rule must be observed that the defendant cannot be twice put in jeopardy (which practically means punished) for the same offense: *Ex parte Lange*, 18 Wall. 169; *Scott v. Davis*, 31 La. Ann. 249. Thus it has been held that where a court may fine or imprison, and it imposes both as a penalty, the payment of the fine is a completion and satisfaction of the penalty, and being so, the power of the court is gone, and it cannot modify the judgment so as to substitute imprisonment for the fine: *Ex parte Lange*, 18 Wall. 169.

In *Brown v. Rice*, 57 Me. 57, 58, where a defendant, having been convicted and sentenced to imprisonment, had suffered nineteen days thereof, when for some reason he was brought again before the court, and the former sentence recalled and a new one imposed, the appellate court say: "If these proceedings were legal, it would seem that the prisoner must suffer punishment under two distinct sentences for the same offense. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it;" and the effect is, that the prisoner for one offense suffers two distinct punishments at different intervals of time and under one indictment. In *State v. Cannon*, 11 Or. 312, a case in which the facts were similar to those in the last case, the court say: "The fact that the last judgment was such as did not exceed the limit fixed for the crime is not material here. The question here is, Could the court revise its judgment and increase the sentence imposed, although during the same term, after its original judgment had gone into effect? It is clear upon authority that this cannot be done. Where a sentence had been passed upon a defendant, and the judgment had gone into effect by commitment of the defendant under it, the court has done all that it had the legal power to do under the proceedings in the case."

In *Commonwealth v. Foster*, 122 Mass. 317, a defendant, found guilty generally on an indictment containing several counts, and sentenced to imprisonment, was held not liable to be again sentenced upon other counts at a subsequent term, and even if the first sentence was erroneous. In *People v. Felker*, 27 N. W. Rep. 869, it was held that a party, upon conviction, may not be given a partial sentence and ordered to present himself at a future day to receive the remainder of the full sentence determined upon.

THE PRINCIPAL CASE IS CITED in *Lowce v. Brigham*, 3 Allen, 429, and *In re Dupee*, 6 Nat. Bank. Reg. 91, to the point that any court has power, at the same term and before entry of final judgment, to alter, revoke, amend, or revise its judgment or decree.

BERKSHIRE GLASS COMPANY v. WOLCOTT.

[2 ALLEN, 227.]

OWNER OF GOODS WHICH HAVE BEEN TRUSTED TO AGENT FOR SPECIAL PURPOSE, and have been wrongfully sold by him, cannot maintain an action of contract against the purchaser for goods sold and delivered.

ACTION on contract for sand sold and delivered. The sand in question belonged to plaintiffs, who authorized one Coman to dig and prepare the same for glass manufacture, and Coman, without right, sold it to defendants, and received payment therefor. The court ruled that after demand and refusal of payment, these facts were no defense to the action, and verdict was given for plaintiffs. Defendants excepted.

J. C. Wolcott, for the defendants.

S. W. Bowerman, for the plaintiffs.

By Court, MERRICK, J. The ruling of the presiding judge, that, assuming the evidence produced upon the trial to be true, the defense set up by the defendants would not avail them, and that the plaintiffs were entitled to recover the value of the sand sued for, was erroneous. If the evidence was true, it was clearly shown that there had been no contract, express or implied, between the parties, and therefore an action of contract cannot be maintained by the plaintiffs. Assuming that the sand belonged to the plaintiffs, and that it was sold to the defendants by Coman without authority, their remedy is against him, or against the defendants in an action of tort for the unlawful taking, detention, and conversion of the property. It is only when the wrong-doer has sold the property unlawfully taken or detained, and received the money for it, that the owner can waive the tort and maintain an action of contract, and in that case the action must be for money had and received to the use of such owner: *Jones v. Hoar*, 5 Pick. 285. The exceptions, therefore, are sustained, and a new trial granted.

WAIVING TORT TO SUE IN ASSUMPSIT: See extensive note to *Webster v. Drinkwater*, 17 Am. Dec. 242 et seq., discussing this subject; and see particularly page 244, discussing the point raised in the principal case as to the right of the party whose goods have been converted to waive the tort and sue in contract on a count for goods sold and delivered. The principal case is cited in *Ladd v. Rogers*, 11 Allen, 212, to the point that the tort cannot be waived, and *assumpsit* for goods sold maintained, but that if the goods have been sold by the person who took them, the owner may affirm the sale, and have an action of money had and received for the proceeds.

FULLER v. HOVEY.

[2 ALLEN, 224.]

DELAY OF MORE THAN THREE YEARS TO PAY INSTALLMENTS OF AGREED PRICE FOR LAND, after the same became due, according to the terms of a written agreement for the conveyance of the same, and after a refusal by the owner of the land to give any further time for making the payments, is such laches as will forfeit all claim to the performance of the contract; and a bill in equity will not lie by the creditor of the person to whom the agreement was given to compel a sale of the land, and the application of the proceeds to the payment of his debt.

BILL in equity. Plaintiff alleged that he had recovered judgment and execution against Langdon, one of the defendants, and that Langdon has no property which can be taken on execution, but is interested in certain land which he formerly owned and conveyed in mortgage to one Luther Stebbins; that Stebbins, for the purpose of foreclosing the mortgage, entered upon the land, and just before the expiration of three years, at the request of Langdon, assigned the mortgage to Jesse Miller, who paid therefor the amount then due upon the note secured by it, agreeing at the same time, with Langdon, to convey the land to him on payment of the sum paid him by Stebbins, and interest; that thereafter, and after the expiration of the three years, Miller, at Langdon's request, conveyed the land in fee to Oren Hovey, who paid Miller the same amount which he had paid Stebbins, and interest; Hovey at the same time binding himself, by a similar agreement to that Miller had made, to convey to Langdon on payment of the purchase-price and interest. Defendants' answer, admitting the conveyances and agreements, showed that the last agreement was that Hovey was to convey to Langdon, on payment by him of four equal yearly installments with interest; that Langdon, after making certain payments, requested further time, which was refused, and that since then, and for three years, no further payments had been made; and that neither Langdon nor Hovey believes that Langdon retains any interest in the land. The remaining facts appear in the opinion.

C. A. Winchester, for the plaintiff.

E. D. Beach, for the defendants.

By Court, BIGELOW, C. J. Taking the statements contained in the answers to be true, as we are bound to do in a hearing on bill and answers, without proof, it is clear that Langdon, the debtor of the plaintiff, has no equitable right or interest in

the property described in the bill, which can be reached or appropriated in payment of the plaintiff's claim. The right of Langdon to a conveyance of the land under the bond given by Hovey has been lost, by the failure of Langdon to comply with its stipulations, and by his acquiescence in the refusal of the former to give him further time to make the payments, according to the terms of the agreement. After so long a neglect to perform the contract, accompanied by notice that a failure to make the payments would be insisted on as a termination of the right of Langdon to ask for a conveyance, it is clear that equity will not compel a performance of the contract in behalf of Langdon. His laches have defeated all right to claim the fulfillment of the contract on the part of Hovey. Although time was not of the essence of the contract originally, it became so by the notice given to Langdon by Hovey, that he should insist on the punctual performance of the stipulations. After such notice, it was incumbent on Langdon to fulfill the bargain on his part within a reasonable time, and by omitting to do so he lost all right to claim its subsequent performance by Hovey: 1 Story's Eq. Jur., sec. 776; *Parkin v. Thorold*, 16 Beav. 59. Besides, in the present case, it appears by the answers that the contract for the conveyance of the estate to Langdon was abandoned by mutual consent of the parties. It is clear, therefore, that there was no interest of an equitable nature in Langdon, which the plaintiff can reach in this process for the satisfaction of his debt.

The suggestion made by the counsel for the plaintiff in his argument, that the arrangement between the defendants was fraudulent and collusive, and so void as against creditors, is one of which we cannot take notice, because no allegation is made in the bill on which any prayer for relief on such ground can be founded.

Bill dismissed.

FORFEITURE OF VENDEE'S RIGHTS UNDER CONTRACT FOR SALE OF LAND, by failure to pay price: See note to *Wells v. Smith*, 31 Am. Dec. 278; and see notes, as to when time is of the essence of contracts, to *Jones v. Robbins*, 50 Id. 697 et seq., and *Johnson v. Evans*, Id. 675, 676. The principal case is cited in *Barnard v. Lee*, 97 Mass. 94, 96, to the point that a contract will not be specifically enforced at the suit of a party who is in default in the payment of the purchase-price, where the parties have made time of the essence of their contract.

DENNY v. MATTOON.

[2 ALLEN, 361.]

LEGISLATURE HAS NO POWER TO VALIDATE OR CONFIRM INSOLVENCY PROCEEDINGS, which were commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, and which have been adjudged invalid by a decree of the highest court of the state.

PETITION for dissolution of injunction upon proceedings in insolvency. The opinion states the facts.

G. F. Hoar, for H. H. Chamberlin.

P. C. Bacon and F. H. Dewey, for the assignees under the second proceedings in insolvency.

B. F. Thomas and W. F. Slocum, for the Grafton Bank.

S. Bartlett, for Alice C. Earle.

By Court, BIGELOW, C. J. The petition in this case is brought under that provision of the statute by which a general superintendence and jurisdiction are given to this court, as a court of chancery, of all cases arising under the insolvent laws. It is a proceeding in the nature of an appeal from the adjudication of the judge of insolvency of the county of Worcester, in refusing to act on a petition presented to him by the petitioner in this case on the tenth day of May, 1860. To understand the question presented for our consideration, it is necessary to recur to that original petition. By it, it appears that the petitioner was a creditor of one Henry D. Stone; that said Stone was declared to be an insolvent debtor on the petition of two of his creditors, by the adjudication of Horace I. Hodges, judge of the court of insolvency of the county of Hampshire; that assignees of said Stone's estate were duly chosen; that the petitioner had duly proved his debt against said Stone's estate; that said assignees had received a large sum of money above all expenses and charges, as the proceeds of said insolvent estate, from which a dividend ought to be paid; and upon these grounds the petitioner prayed that said assignees might be ordered to pay a dividend on said estate, and that such proceedings might be had as were necessary in order that the funds in their hands might be duly distributed according to law. The judge of insolvency, to whom this petition was presented, refused to grant the prayer thereof, and assigned as the reason for his refusal that he had been prohibited and enjoined by this court from proceeding further under the warrant issued

by said Hodges against the estate of said Stone, which prohibition and injunction were unreversed, and still remained in full force.

The object of the present petition is to obtain a decree of this court directing the judge of insolvency to proceed and hear the original petition, and to act thereon in such manner that said assignees may be required to make due distribution of the funds in their hands among the creditors of said Stone, according to the provisions of the insolvent laws; and the petitioner avers, as the specific ground on which the prayer of his petition is founded, that an act has been passed by the legislature of the commonwealth, approved March 14, 1860, confirming all the proceedings theretofore instituted before said Hodges, by reason whereof the injunction of this court should be dissolved, and the said judge should be ordered to act further in said case. It is obvious, from this history of the previous proceedings, that the scope of our present inquiry cannot be confined to the precise matter comprehended within the prayer for relief in the original petition, and the adjudication of the judge of insolvency thereon. The case involves other rights than those of the petitioner, and reaches beyond the mere question of disposing in a proper manner of the funds in the hands of said assignees. These, it is true, are the matters more immediately and directly in issue; but they involve the broader and more general question of the validity of the original adjudication, by which said Stone was declared an insolvent, and his property was sequestered and conveyed to said assignees, and of the rights of all parties who claim titles or interests by sales, grants, or conveyances derived from said assignees, or in any way arising or growing out of said insolvent proceedings. It was this view of the nature and effect of the present petition, as operating to conclude the rights of all who might claim under the decree adjudging said Stone to be an insolvent debtor, according to the principles stated in *Merriam v. Sewall*, 8 Gray, 327, which prompted us to give notice to all parties interested of the pendency of the present petition, so that the rights and interests of all persons, so far as they may be affected by the adjudication in the case, might be brought distinctly before us.

In the consideration of the case, we have not deemed it necessary to pause to inquire whether there is any technical obstacle or difficulty in the way of maintaining the petition, on the ground that the proper remedy, if any exists, is by a bill of review,

and not by a proceeding like the present, in the nature of a petition asking for specific relief under the statutes of 1838, chapter 163, section 18. The real merits of the controversy between the parties have been very fully and ably discussed at the bar. We have found it necessary to consider with care the interesting and important questions which they involve, and having arrived at conclusions which seem to us to be decisive of the whole case, it has seemed to us inexpedient to allow an objection of a purely formal nature to stand in the way of stating the result to which our minds have been brought on the main point in issue.

This court has already had occasion to decide that the proceedings by said Horace I. Hodges, in issuing the warrant against the estate of said Stone and in adjudging him to be an insolvent debtor, were originally illegal and invalid, and the assignees of the estate of said Stone, who were chosen and appointed at a meeting of his creditors, held in pursuance of said warrant and adjudication, have been by a decree of this court perpetually enjoined from any further action in administering or disposing of the assets in their hands as assignees, or in any way intermeddling with his estate. The reasons on which that decision was founded are stated at length in *Grafton Bank v. Bickford*, 13 Gray, 564. There would seem to be no room for doubt that, if the judgment rendered in that case is not invalidated or annulled, but still remains in full force, it constitutes a complete bar to the maintenance of the present petition, so far, at least, as the rights of parties and privies to it are involved in the present proceeding. It was in the nature of a judgment *in rem*, or like a decree in the case of a creditor's bill, by which the rights of all persons who are parties to the proceeding, or who might have become so, or who stand in the relation of privies to the subject-matter in controversy, are finally determined. It settled conclusively the question of the invalidity of the proceedings by which Stone was adjudged to be insolvent, and his estate was sequestrated and transferred to his assignees. Whatever may have been its effect on the rights of those who had no constructive notice of the pendency of that proceeding, or who were not so situated in relation to the question at issue as to be within the rule of equity by which the rights of those who are represented in a suit are held to be concluded, that judgment was certainly binding on the immediate parties to the present petition; on the petitioner, who was directly privy

thereto as a creditor; and on the judge of insolvency and the assignees, who were respondents and duly served with notice. But we are strongly inclined to the opinion that this was not the whole extent to which it operated on the rights of parties. It was a judicial determination, by which it was adjudged once for all that the decree by which the property of Stone was taken and conveyed to his assignees was invalid: *Wheelock v. Hastings*, 4 Met. 504.

The proceedings in insolvency were thereby declared void. It would seem to follow that the rights of all persons claiming under or by virtue of said decree, or in privity with said assignees, were thereby conclusively and finally settled. Such we are disposed to believe must be the effect of that decree, if it be true that a judgment of this court on the validity of insolvent proceedings, when drawn in question on a petition in the nature of an appeal, is conclusive as to the subject-matter of the appeal, that is, as to the validity of the sequestration of the debtor's estate. Such we understand to have been the decision of the court in *Merriam v. Sewall*, 8 Gray, 327. This result seems to flow necessarily from the nature of the proceeding. In the language of one of the learned counsel who appeared in aid of the petition, "it would be intolerable if each creditor or other party in interest could maintain a separate petition successively to try and determine the same question." If it be alleged that the former judgment, by which the proceedings in insolvency against said Stone were held void, cannot affect the rights of persons holding estates by grants, sales, or other conveyances from said assignees, because they did not become parties to that proceeding and were not notified of its pendency, an appropriate and sufficient answer would seem to be that such a defect in giving notice to parties interested might constitute an error in the proceedings, and furnish good ground for a rehearing of the case upon proper process, so far as it operated on the rights of parties to whom due notice was not given; but that it does not affect or impair the decree, so long as it remains unreversed and in full force, by which it has been determined that the property of said Stone was not legally vested in his assignees. The *res adjudicata* was the title to the estate of the debtor as affected by the insolvent proceedings. Although that decree may be subject to reconsideration and modification for error, either of fact or law, yet if it is still in force until changed or modified on due proceedings had, it would seem that it must have the binding

force and effect of a perfect judgment *in rem*. If this be not so, we do not see why the evils indicated in *Merriam v. Sewall*, 8 Gray, 327, would not follow in all cases where notice of the original proceedings was not given to all parties interested. The same question might be litigated anew in successive suits with different results.

Such being the nature and effect of the judgment which has heretofore been rendered on the subject-matter in controversy in the present proceeding, the inquiry arises whether it has ceased to be a binding judgment, and is no longer conclusive on the rights of parties and privies. In considering this question, it is to be borne in mind that the object of the present proceeding is not to reverse or correct the former decree as being erroneous by reason of defect or informality. The original validity of that judgment is not called in question by the petitioner, or by any of the parties now before the court. Nor are we called on to decide whether this court has power, for sufficient cause, to revive or rehabilitate proceedings in insolvency, after a decree has been passed annulling or superseding them. The gist of the present inquiry is, whether the legislature, by a statute confirming proceedings which this court has adjudged to be void, and declaring that the same shall be taken to be good and valid in law, have the power to impair, set aside, or annul the force and effect of a judgment in its nature final, so that it can no longer be held to be conclusive on the rights of parties. Such is the effect which the petitioner seeks to give to the statutes of 1860, chapter 78. It is the sole ground on which the interposition of the court is asked in the present proceeding. The validity of the statute, in its application to other cases or proceedings in insolvency, is not now before us. The precise question is, whether it can be held to operate so as to confer a jurisdiction over parties and proceedings which it has been judicially determined did not exist, and give validity to acts and processes which have been adjudged void.

The statement of this question seems to us to suggest the obvious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial, from the use of which it is expressly prohibited by the thirtieth article of the declaration of rights. The line which marks and separates judicial from legislative duties and functions is often indistinct and uncertain, and it is some-

times difficult to decide within which of the two classes a particular subject falls. All statutes of a declaratory nature which are designed to interpret or give a meaning to previous enactments, or to confirm the rights of parties, either under their own contracts, or growing out of the proceedings of courts or public bodies which lack legal validity, involve in a certain sense the exercise of a judicial power. They operate on subjects which might properly come within the cognizance of the courts, and form the basis of judicial consideration and judgment. But they may nevertheless be supported as being within the legitimate sphere of legislative action, on the ground that they do not declare or determine, but only confirm, rights; that they give effect to the acts of parties according to their intent; that they furnish new and more efficacious remedies, or create a more beneficial interest or tenure, or by supplying defects and curing informalities in the proceedings of courts, or of public officers acting within the scope of their authority, they give effect to acts to which there was the express or implied assent of the parties interested. Statutes which are intended to accomplish such purposes do not necessarily invade the province or directly interfere with the action of judicial tribunals. But if we adopt the broadest and most comprehensive view of the power of the legislature, we must place some limit beyond which the authority of the legislature cannot go without trenching on the clear and well-defined boundaries of judicial power. The wise and salutary provision in our constitution, by which its framers sought to declare the distribution of the different powers of the government, and to keep them separate and distinct, is not a mere abstract truth. It is capable of a practical application, by which each department may be made to operate within its own appropriate sphere, so as to accomplish the great end of securing a government of laws, and not of men. Although it may be difficult, if not impossible, to lay down any general rule which may serve to determine, in all cases, whether the limits of constitutional restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case, as it arises, some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law the arbitrary will of the legislature, and thereby control-

ling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary.

It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew, facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action: *Taylor v. Place*, 4 R. I. 324, 337; *Lewis v. Webb*, 3 Me. 326; *De Chastellux v. Fairchild*, 15 Pa. St. 18 [53 Am. Dec. 570]. *A fortiori*, an act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority. Lord Coke calls judgment and execution the "fruit of the law." To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential prerogative. It could then no longer finally adjudicate and determine the rights of litigants. The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. The power to correct errors, and to revise and reverse judgments, which in the strictest sense of the word has always been deemed essentially judicial, would be transferred to the legislative branch of the government, even to the extent of controlling the final decrees of the tribunal of last resort. It is obvious that such an exercise of authority would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental principles. Indeed, it is difficult to see how the legislature could more palpably invade the judicial department and effectually usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in

their nature final, and which would otherwise be conclusive on the rights of parties. Upon this ground, we are of opinion that the statute of 1860, chapter 78, cannot be held to extend to a case like the present, in which a judicial decree declaring the proceedings void had been entered at the time of the enactment of the law. If such was the intent of the legislature in passing the act, it cannot be carried into effect, because it would operate to annul or reverse a final judgment of this court, which had conclusively settled the rights of persons who are parties and privies to the present proceeding.

But there is another aspect of this case which seems to us to be equally decisive against any construction of the statute under consideration, by which it could be held to apply to the proceedings in insolvency against Stone, so as to give them validity *ab initio*, and render it the duty of the court to revive them by a dissolution of the injunction now in force. The first and essential step in all proceedings under the insolvent law, on which the validity of all acts and decrees in the sequestration of the estate and the administration of the assets of the debtor depends, is, that there should be an adjudication concerning the condition or *status* of the debtor. He must be found to be insolvent within the legal signification of that word, in order that his property may be taken, the title thereto vested in the assignees, and its proceeds be distributed among his creditors. Especially is this true where, as in the case at bar, the proceedings are *in invitum*, and no assent of the debtor, either express or implied, can be had or inferred to aid or confirm the course of legal proceedings by which his right to his property was divested and appropriated to the payment of his debts. The determination of the question whether a debtor is so situated in relation to his creditors as to be subject in his person and estate to the provisions of the insolvent laws, is, in its nature, the exercise of a judicial power. It is not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles to facts which may be proved. Nor is it to be determined as a matter of course on the mere petition of the debtor or of his creditor, but it must be the result of due inquiry sufficient to satisfy the discretion and convince the judgment of the officer of the law, in whom the authority and jurisdiction to decide the question have been duly vested. Until such adjudication, no proper foundation is laid on which proceedings in insolvency can be maintained, nor can the property of the debtor be said

to have been taken from him by due process according to the law of the land. In the case at bar, there never has been any legal and valid determination that said Stone was insolvent at the time of the commencement of the original proceedings against him by his creditors. His condition and *status* at that point of time have never been adjudicated or passed on by any person of competent authority or jurisdiction. Such was the decision of the court when the validity of the proceedings was in controversy before us in *Grafton Bank v. Bickford*, 13 Gray, 564. It therefore follows that if he is held to be subject to the consequences which would follow from a proper and valid adjudication, to take effect from the time when the first warrant was issued against his estate, it must be by force of the act of the legislature, which confirms the proceedings and declares them to be valid. It is, then, not by an order or adjudication, made by competent authority in the due course of proceedings according to the standing law, that said Stone has been declared to be insolvent and his estate sequestrated and vested in assignees, but by an act of legislation, operating retrospectively and purporting to give efficacy and validity to acts and processes which have been adjudged void. If such a statute does not constitute an exercise of judicial power by the legislature, it is certainly a violation of another fundamental principle of the constitution. It takes away from a subject his property, not by due process of law or the law of the land, but by an arbitrary exercise of legislative will. Under our constitution, the right of the legislature to interfere with vested rights, and to deprive persons of their estate, is not left to implication. Not only is the right of acquiring, possessing, and protecting property declared to be among the essential and unalienable rights of all men, but also, by the twelfth article of the declaration of rights, the great principle is enunciated that no subject shall be deprived of his property or estate but "by the judgment of his peers, or the law of the land."

The meaning of the latter phrase, adopted as it was from Magna Charta, is well settled and familiar. As applied to civil rights and proceedings, it signifies "due process of law," or "by writ original of the common law:" 2 Inst. 45, 50. Or in other words, and in a more enlarged and comprehensive sense, it imports that no person shall be deprived of his right to his property by legislation merely; but that it shall be done only according to general laws, after due inquiry, in a regular

course of proceeding, according to prescribed forms, and with due opportunity to parties for a hearing before the matter shall be adjudged against them. It is by the law in its due and orderly administration through appropriate tribunals, and not by force of an act of legislation only, that the subject can be deprived of his property in the true sense of that clause of the constitution which secures to him the protection of "the law of the land:" 2 Kent's Com., 6th ed., 13; Sedgwick on Stat. & Const. Law, 538; *Taylor v. Porter*, 4 Hill, 140 [40 Am. Dec. 274]; *Wynehamer v. People*, 13 N. Y. 378; *Hoke v. Henderson*, 4 Dev. 15 [25 Am. Dec. 677]; *Sohier v. Massachusetts General Hospital*, 3 Cush. 483, 493. In this sense, it cannot be said that Stone was declared to be an insolvent debtor under the original proceedings instituted against him. Prior to the enactment of the statute, by which it is alleged that these proceedings were confirmed and made valid, there had been no adjudication or decree by virtue of which his property had been taken from him, and the title to it passed to his assignees. It was still vested in him; he had the entire *jus disponendi*; his power over it was as perfect as if no warrant had been issued against him or his estate. Clearly this was so, after the proceedings had been adjudged to be void by a decree of this court. It was then his property by force of a valid judgment *in rem*. It is, therefore, the effect of the statute by which, if at all, the property of Stone is taken from him, or from those who claim under him; and this, too, operating retrospectively, and confirming proceedings which had previously been adjudged void, which were commenced and prosecuted *in invitum*, and to which there is no assent by Stone or his grantees, either express or implied. How, then, can it be said that he was deprived of his estate by the due process of law, or according to the law of the land? Is it not a case where an attempt is made to impair vested rights by taking property against the consent of the owner by the mere force of a legislative act?

There is a class of cases, the authority of which cannot be denied, by which it is settled that persons who take grants of property, which has previously been sold and conveyed by deeds or under legal proceedings, which lack validity by reason of some omission or informality, hold subject to the right of the legislature to cure such errors or defects by acts of retrospective legislation. To such cases, the salutary principle is applicable that the title to the property is deemed to have

been vested subject to the equity existing in the first purchaser which the subsequent statute recognizes and enforces. But it is a mistake to suppose that this case comes within that principle. No such equity existed against Stone. After the first proceedings were adjudged void, he and those claiming under him held the property by a title which was clear and unimpeachable, and which was subject to no right or claim in others which could be made valid, or which could support an equity which legislation might ripen into a paramount title against their consent. To say that a man's property may be taken from him by force of an act of legislation, which attempts to confirm and give validity to proceedings which have previously been adjudged void for want of authority and jurisdiction, is only to affirm that he may be deprived of his estate without due process of law. There is some show of reason for the doctrine that defects and informalities in legal proceedings may be supplied or cured by legislative enactment, so as effectually to divest titles to property even as against the original owners. But in such cases legislation finds its support and sanction either in the express or implied assent of the owner, so that the maxim, *Volenti non fit injuri*, is applicable; or from the principle that it only gives force and effect to the regular administration of the law through appropriate tribunals having jurisdiction of the subject-matter. Both these elements are wanting in the case before us. The proceedings against Stone were *in invitum*, and there is no proof of any assent by him to the sequestration of his estate. They were not adjudged to be invalid by reason of any error or omission, but because there was an entire absence of any jurisdiction or authority to commence or conduct them at all. This, we think, is the vital distinction between this case and most of the cases cited by the counsel in support of the petition, in which the authority of the legislature to pass healing acts to confirm the equity of those holding under defective legal proceedings has been recognized. No such equity can be set up under proceedings which were wholly without authority of law; still less can it be asserted to support titles acquired under such proceedings after they have been adjudged void by the decree of a competent tribunal operating as a judgment *in rem*.

It was suggested by the learned counsel who appeared in aid of the present petition, that the validity of the statute might be upheld and vindicated as a confirmation of the acts of a judge *de facto*. But the difficulty in the way of adopting this

suggestion is, that it is founded on a misapprehension. The judge of insolvency for the county of Hampshire, so far as he undertook to act, and to take jurisdiction of cases in the county of Worcester, was not, in the legal sense of the term, a judge *de facto*. He had no color or show of right to exercise the duties of the office. He did not act under any appointment or commission which conferred on him a title to perform official duties, or hold jurisdiction of cases in that county. This was essential to give to him the character of a judge in fact. In the absence of any legal or *prima facie* right to fill the office, he was, within the legal signification of the word, a mere usurper, or intruder, whose acts and doings were not even colorably valid: *Coolidge v. Brigham*, 1 Allen, 333; *Fitchburg Railroad v. Grand Junction Railroad and Depot Co.*, Id. 552. It is not, therefore, a case where a statute was designed to confirm the acts of an officer or magistrate who has exercised a jurisdiction to which he had an apparent valid right, by virtue of an appointment or election in which there was some defect or illegality. The act under consideration goes much further. It purports to give validity to the unauthorized acts of a person who has exercised a jurisdiction to which it has been judicially determined that he had no claim or color of title. We do not mean to say that it is not competent for the legislature to pass statutes confirming acts of magistrates, or other public officers, which were originally void. On the contrary, there are many cases in which such legislation would not only be valid, but would operate with a most salutary and beneficial effect. Nor do we intend to be understood that this statute may not render valid many of the proceedings which it was intended to confirm. But we do say that we cannot give it effect where, as in the present case, it operates to annul or set aside the judgment of this court, and to disturb vested rights by taking property, without due process of law, against the consent of the owner.

We do not think it necessary to examine at length the cases cited from our reports by the counsel who appeared in aid of the petition. None of them are directly in point on the questions raised in the present case. The leading ones are *Walter v. Bacon*, 8 Mass. 468; *Patterson v. Philbrook*, 9 Id. 151; *Locke v. Dane*, Id. 860; *Simmons v. Hanover*, 23 Pick. 188. Of the first three, it may be said that they are not very satisfactory, and certainly cannot be considered as an authority beyond the precise cases which they decide. When necessary, it may be

proper to reconsider them with care. But they do not decide that the legislature can confirm proceedings which have been adjudged void by the tribunal of last resort. No such question could arise in those cases, because the act which was there under consideration contained a proviso that it should not affect any suit in which final judgment had been rendered by this court: Stats. 1808, c. 92. In regard to the last-named case, it is sufficient to say that the statute, the validity of which was there affirmed, in no way affected any vested right to property, and might well be sustained as affecting only a remedy, and not a right.

Petition dismissed.

LEGISLATURE CANNOT EXERCISE JUDICIAL FUNCTIONS so as to alter effect of judgments and decrees of courts, or to render valid proceedings in courts which have been adjudged to be void: *Menges v. Dentler*, 75 Am. Dec. 616, and note 621. The principal case is cited to this effect in *Pryor v. Downey*, 50 Cal. 408, 410; *Columbus, C., & I. R'y Co. v. Board of Commissioners*, 65 Ind. 427; *Waters v. Stickney*, 12 Allen, 7; *Sparhawk v. Sparhawk*, 116 Mass. 318; *Commonwealth v. Brown*, 121 Id. 79; *Forster v. Forster*, 129 Id. 563-566; *Butler v. Supervisors Saginaw Co.*, 26 Mich. 28; *Milam Co. v. Bateman*, 54 Tex. 167; *Mills v. Charleton*, 29 Wis. 416. But the enactment of statutes for the purpose of curing defects and irregularities in proceedings for assessment and collection of taxes is not such an exercise of judicial functions: *Blount v. Janesville*, 31 Id. 659; nor the enactment of statutes providing new remedies: *Weed v. Donovan*, 114 Mass. 183, citing the principal case.

GODDARD v. CHAFFEE.

[3 ALLEN, 206.]

VIOLIN AND BOW OF DEBTOR ARE EXEMPT FROM ATTACHMENT, if his sole business is that of a musician, as a member of a military and quadrille band, and he obtains most of his support by playing upon his violin, provided the value of all his musical instruments is less than one hundred dollars.

TORT against a deputy sheriff for attaching plaintiff's violin and bow. The opinion states the facts.

S. P. Twiss, for the plaintiff.

G. F. Verry, for the defendant.

By Court, **MERRICK, J.** The statute exempts from attachment the implements of a debtor necessary for carrying on his trade or business, and not exceeding one hundred dollars in value: Gen. Stats., c. 183, sec. 82. "Business" is a word of

large signification, and denotes the employment or occupation in which a person is engaged to procure a living. The plaintiff is a musician, and has for some years been employed in playing upon musical instruments, as a member of military and quadrille bands. He has in that way obtained his whole support and livelihood, has been engaged in no other pursuit, and has had no other trade or employment. That, therefore, is his business; and the only instruments owned and used by him in pursuing it are a violin and cornet, the united value of which is less than one hundred dollars. The violin is a small instrument played upon exclusively by the hand; and upon the facts agreed, it is obviously essential to make his labor available, and enable him to do the work and render the service which he contracts to perform. In this view, in conformity to the interpretation heretofore given to the provisions of the statute, it was clearly exempt from liability to attachment or seizure upon execution: *Wilson v. Elliot*, 7 Gray, 69. The defendant must therefore be defaulted, and judgment rendered for the plaintiff for the damages agreed upon by the parties.

EXEMPTION OF "TOOLS" AND "IMPLEMENTS OF TRADE" from execution or attachment, and what included within such designation: See note to *Kilburn v. Deming*, 21 Am. Dec. 545-554, citing many cases, and among them the principal case at page 554. In *Baker v. Willis*, 123 Mass. 195, the principal case is cited on this point, and it is held that the cornet of one who is both a musician and a tinner, and obtains support by both occupations, is exempt if the value of cornet and tinner's tools do not, together, amount to more than the sum exempt by statute. In *Wallace v. Bartlett*, 108 Id. 54, the principal case is also cited on this point, and it is held that fixtures for carrying on a grocers' or butchers' business, as weights and measures, horse and carriage, and other articles used in the trade, are not exempt.

McGRATH v. SEAGRAVE.

[2 ALLEN, 428.]

JUDGMENT RECOVERED BEFORE INFERIOR COURT MAY BE PROVED BY memoranda of the magistrate upon his docket, and by the production of the original papers in the case, verified by the testimony of the magistrate, if these, when taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made.

ACTION upon a promissory note. The defendant relied in set-off on a judgment recovered against the plaintiff before a county magistrate, and assigned to defendant with notice to

plaintiff. Plaintiff denied the existence and validity of the judgment. The remaining facts appear in the opinion.

W. A. Williams, for the plaintiff.

T. L. Nelson, for the defendant.

By Court, BIGELOW, C. J. We think the docket entry with the accompanying papers, verified by the testimony of the magistrate, were competent and sufficient proof of a judgment duly recovered against the plaintiff. It was the best evidence in existence to prove the fact. The magistrate had not extended the record. The proceedings all rested in his minutes, and in the writ and other papers which were in his possession. From these, taken together, a complete and perfect record could be made up. Every essential fact to constitute a judgment appears from an inspection of the papers and the minutes of the magistrate, without resorting to parol proof. The names of the parties, the notice to the defendant and its return, the default of the defendant, the continuance of the case for judgment until the twenty-third day of July, the rendition of judgment on that day for the sum of one hundred dollars damages, and seven dollars and fifty-three cents costs, and the issue of execution on the judgment on the twenty-fifth day of July, are all apparent from the written memoranda produced by the magistrate, and verified by his oath as being the original papers and minutes of the record. The rule is well settled, that minutes may be introduced when the record has not been drawn out *in extenso*, as containing the elements of a record, and in truth, for the time being, constituting the record itself: *Sayles v. Briggs*, 4 Met. 421, 423; *Arundell v. White*, 14 East, 216; *King v. Smith*, 8 Barn. & Cress. 341; 1 Greenl. Ev., sec. 513. In the case first cited, the objection to the evidence offered was not that a record could not be proved by minutes of the magistrate, if they were full and sufficient to supply everything that was essential to make the record perfect, but that in that case there were no memoranda or papers in existence to show all the proceedings before the magistrate, and that the absence of them could not be supplied by parol proof. The evidence to prove the judgment in the present case is much more full and complete than that which received the sanction of this court in *Park v. Darling*, 4 Cush. 197.

There can be no doubt that the judgment of an inferior court may be proved by producing the original record, if it is drawn out in full, or the minutes of the proceedings, when

they are not made up in form and fully extended. But the better and more regular mode of proving judgments of magistrates is by an exemplified copy of the proceedings duly drawn out and certified. This can be always easily procured, and its production avoids the danger of the loss of original papers, and of mistakes in apprehending the meaning of brief docket entries, which are sometimes obscure and difficult to understand.

Exceptions overruled.

CLERK'S DOCKET AND PAPERS, FILED IN CASE in an inferior court, constitute the record, and are competent evidence until the record is extended; *Commonwealth v. Hatfield*, 107 Mass. 231, citing the principal case.

SHERMAN v. FALL RIVER IRON WORKS COMPANY.

[2 ALLEN, 524.]

LESSER MAY MAINTAIN ACTION FOR NUISANCE TO REAL ESTATE which he occupies, if injurious to his possessory interest; but for any injury to the reversion, the action must be brought by the landlord.

LESSER MAY MAINTAIN ACTION AGAINST ONE WHO HAS LAID GAS-PIPES in neighboring streets so imperfectly that they constitute nuisance to his possession, in allowing gas to escape through the ground and into the water of a well on his premises which are used for a livery-stable, thereby rendering the water unfit for use, and making the enjoyment of his estate less beneficial, although the nuisance may have existed in a less degree when the premises were hired, and may recover for the inconvenience to which he has thereby been subjected, and expenses which he has reasonably and properly incurred in attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted by the gas.

NON-JOINDER OF PLAINTIFF IN TORT can be taken advantage of only by plea in abatement.

TORT for injuries caused by laying imperfect gas-pipes in streets near premises which plaintiff had hired and used for the purpose of a livery-stable, by reason of which gas escaped through the ground and into the water of a well on the premises, thereby rendering it unfit for use, and deleterious in its effects on the horses and business of plaintiff. The remaining facts are stated in the opinion.

E. H. Bennett and L. Lapham, for the plaintiff.

C. I. Reed and J. C. Blaisdell, for the defendants.

By Court, HOAR, J. It may be that the plaintiff is not entitled to recover a considerable part of the damages which he

claims, yet the court can perceive no legal objection to the maintenance of this action.

1. A lessee may maintain an action for a nuisance to the real estate which he occupies, which is injurious to his possessory interest; while the landlord must bring the action for any injury to the reversion. If the nuisance of which the plaintiff complains made the enjoyment of the estate less beneficial, or in any way rendered it expensive or inconvenient, without fault on his part, he is entitled to compensation therefor.

2. Although the nuisance may have existed when the plaintiff hired the premises, it is a continuous nuisance, constantly created and renewed by the manufacture and distribution of the gas; and for this maintenance and renewal of the injury an action lies. Besides, the proof offered was, that the offensive action of the gas was largely increased after the plaintiff's title accrued.

3. The objection that the co-tenant of the plaintiff should have joined in the suit is only available in abatement.

4. If the injury to the plaintiff's horses, and to his business, was occasioned by his own carelessness in allowing the horses to drink the water after he knew that it was corrupted by the gas, the effect would only be to exclude that particular element of damages. He can recover only for the natural and direct consequences of the wrongful act of the defendants, and not consequential damages which might have been avoided by ordinary care on his own part. But if the loss of the use of the well was in itself an inconvenience, or if he was put to expense in reasonable and proper attempts to exclude the gas from his well, the defendants are not to be protected from responsibility to the extent which these facts would justify, because the plaintiff has negligently permitted other injurious consequences to follow, for which he can have no remedy.

Exceptions sustained.

ACTION FOR DAMAGES FOR NUISANCE may be maintained by one in possession for injury to his possessory interest, though he have no title: *Crommelin v. Cox*, 68 Am. Dec. 120, and note 126. On the question of damages, it is said that a party injured can only recover for the consequences of wrongful acts of the defendant, and not for injuries which might have been avoided by ordinary care on plaintiff's part: *Flynn v. Trask*, 11 Allen, 554, citing the principal case.

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2. **FINDER OF WRECK AS SUCH** is entitled to the property as owner, or to its possession as salvor, and will be protected from the interference of third persons. *Id.*
3. **PROPERTY IS ABANDONED WHEN IT IS THROWN AWAY**, or is voluntarily forsaken by the owner. It then becomes the property of the first occupant, subject to the superior claim of the owner, except that in salvage cases, by the admiralty law, the finder may retain possession until paid his compensation, or until the property is submitted to legal jurisdiction for the ascertainment of compensation. *Id.*
4. **OCCUPATION OR POSSESSION OF PROPERTY LOST**, abandoned, or without an owner, as a wreck, must depend upon an actual taking of the property with the intent to reduce it to possession. This possession need not be an absolute or perpetual appropriation of the property to the use of the finder, nor need the act of taking possession be manual; still, marking trees that extend across the wreck, or affixing temporary buoys to it, are not such acts of possession as the law will notice and protect as indicating a desire or intention to appropriate the property. *Id.*

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5. SHERIFF HAVING ATTACHMENT MAY LEVY ON DEFENDANT'S INTEREST in a growing crop of grain under a contract to work land on shares; and to effect this, may take and detain possession of the entire quantity of grain; but he can sell under the execution on a judgment that may be recovered only the undivided interest of such defendant, the purchaser at the sale becoming a tenant in common with the owners of the other undivided interests. *Bernal v. Hovious*, 147.
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12. CLAIMANTS UNDER MORTGAGE UPON BOAT, against which an attachment has issued, do not preclude themselves from the right to assert their claim to the property, or to contest the validity of the attachment, by executing a bond to the effect that they would pay such sum as might be adjudged in the action, or to have the boat forthcoming for the satisfaction of such judgment, whichever shall be ordered. *Id.*
13. UNDER SECTION 268, CIVIL CODE OF KENTUCKY, concerning the delivery of any vessel attached, upon the execution of a bond to the effect that the obligor will pay such sum as may be adjudged against him, or that the vessel shall be forthcoming to satisfy any judgment which may be rendered, "whichever shall be directed by the court." The latter clause does not confer upon the court an unlimited and arbitrary discretion, either to render judgment for such sum as plaintiff may show himself entitled to recover, and then require the obligor in the bond to pay that sum, or to order the forthcoming of the vessel, subject to the order of the court, for the satisfaction of such sum. Such judgment should be rendered as will protect all the parties, according to the facts as they appear. *Id.*

14. WHERE LIEN AGAINST VESSEL IS SOUGHT TO BE ENFORCED BY ATTACHMENT, and it transpires that the equity of redemption of the mortgage of such vessel is all that can be subjected to plaintiff's demand, such should be the judgment of the court; and to satisfy such judgment, the forthcoming of the vessel may be ordered. To this extent only can the obligors in a bond, to the effect that they will pay such sum as may be adjudged against them, or have the vessel forthcoming to satisfy such judgment, be held liable for a failure or refusal to comply with the order. The value of the equity of redemption should be ascertained by reference to a master. *Id.*
15. JUNIOR ATTACHING CREDITOR CANNOT TAKE ADVANTAGE OF IRREGULARITIES in the affidavit or bond given by a prior attaching creditor of a common debtor. The fact, therefore, that an affidavit omits to aver that the sum for which the writ is asked is "an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the defendant," does not render the attachment issued a nullity as against subsequent attaching creditors. *Fridenberg v. Pierson*, 162.
16. WHAT ARE IRREGULARITIES WHICH AVOID ATTACHMENT STATED. *Id.*
17. INTERVENORS HAVING DIRECT LEGAL INTEREST in the success of defendant, in defeating plaintiff's suit by attachment, have the right to join in all defenses pleaded by defendants *curator ad hoc*, including the plea of prescription when defendant is insolvent. *New Orleans Canal etc. Co. v. Beard*, 582.
18. CHANGE OF RESIDENCE, OPENLY AND PUBLICLY MADE from one part or state of our common country to that of another, cannot be considered an act on the part of the debtor which suspends prescription, and creates a proper case for the application of the maxim, *Contra non valentem agere non currit prescriptio*; and the fact of his pecuniary embarrassments, at the time of such removal, does not *per se* vary the case. *Id.*
19. WORD "PROCESS," WHEN USED IN LAW RELATIVE TO SERVICE OF WRITS, is sufficiently comprehensive to include an attachment or garnishment. *Boyd v. Chesapeake etc. Canal Co.*, 648.
20. SHERIFF'S RETURN UPON WRIT OF ATTACHMENT is evidence of the service of that writ, as in the case of other writs. *Id.*
21. INTERROGATORIES, FILED BY PLAINTIFF IN ATTACHMENT PROCEEDINGS, to be answered by a garnishee, may be waived by him, and a rule of court as to the service of them is not to be enforced until the garnishee appears and the plaintiff is informed of the defense relied upon. *Id.*
See ATTORNEY AND CLIENT, 4, 5; JUDGMENTS, 5.

ATTORNEY AND CLIENT.

1. RELATION OF ATTORNEY AND CLIENT IS NOT CONSUMMATED without a retainer or fee paid. *De Wolf v. Strader*, 371.
2. ATTORNEY EMPLOYED MERELY AS SCRIVENER TO DRAW UP DEED IS COMPETENT TO TESTIFY concerning what comes to his knowledge in connection with the transaction. *Id.*
3. WHERE PARTIES TAKE UPON THEMSELVES DEFENSE of a suit, after notifying the real defendant of the pendency of the action, they must pay their attorney's fees. *Gaines v. Poor*, 559.

4. ATTORNEY EMPLOYED UNDER GENERAL RETAINER TO COLLECT CLAIM BY SUIT has power to release lien of attachment on defendant's property on taking other security. *Monson v. Hawley*, 233.
5. ATTORNEY OF PLAINTIFF, IN DIRECTING LEVY OF ATTACHMENT, is bound to consult the wishes and convenience of the debtor, so far as is consistent with his object in obtaining security for the claim. *Id.*
6. WHERE JUDGMENT IN REPLEVIN SUIT IS RENDERED FOR DEFENDANT, the attorney has a lien on the execution issued thereon, and to the extent of the lien is to be regarded as an equitable assignee, and as such entitled to the protection of the law in the enforcement of his claims. To that extent, his rights of action are co-extensive with those of his client. *Newbert v. Cunningham*, 612.
7. ATTORNEY'S LIEN DOES NOT ATTACH IN SUIT UNTIL RENDITION OF JUDGMENT THEREIN, but when judgment has been obtained, an execution issued, and the lien has attached thereto, it extends to suits arising from and incidental to the enforcement of the judgment. *Id.*
8. ATTORNEY IS NOT BOUND TO GIVE NOTICE OF HIS INTENTION TO RELY ON HIS LIEN, in order to make it available against the discharge of the creditor. *Id.*
9. ATTORNEY, AS EQUITABLE ASSIGNEE, HAS RIGHT TO ENFORCE REPLEVIN BOND, to the extent of his lien, and this right the assignee in the bond cannot defeat. *Id.*
10. OFFICER IS LIABLE FOR TAKING REPLEVIN BOND WITH INSUFFICIENT SURETIES, where the execution issued against them cannot be satisfied by reason of their insolvency. The attorney has the right to enforce such liability by an action in the name of the defendant in the replevin suit, to whom the bond was made, and his discharge of the officer cannot defeat the attorney's right to recover. *Id.*
11. RIGHT OF ACTION AGAINST SHERIFF FOR TAKING INSUFFICIENT SURETIES IN REPLEVIN does not accrue until after the lien of the attorney has become perfected by the rendition of judgment in the replevin suit, and the statute of limitations in such case does not begin to run till then. *Id.*
12. ATTORNEY'S LIEN EXTENDS ONLY TO SUCH FEES AND DISBURSEMENTS as are taxed and included in the execution. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5; INSANITY, 2.

BAGGAGE.

See COMMON CARRIERS, 13.

BANKS AND BANKING.

BANK RECEIVING FOR COLLECTION BILL OR NOTE WHICH HAS TO BE TRANSMITTED TO ANOTHER PLACE to be collected, discharges its duty by sending it in due season to a competent reliable agent, with proper instructions for its collection. *Atina Ins. Co. v. Alton City Bank*, 323.

BASTARDY.

See NEGOTIABLE INSTRUMENTS, 1.

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See HUSBAND AND WIFE, 12.

BILLS OF LADING.

See CONSTITUTIONAL LAW, 10.

BONDS.

OFFICIAL BOND IS BINDING ON PRINCIPAL OBLIGOR, BUT NOT ON SURETIES, where it is presented for approval by the principal, signed and sealed, but with the amount of the penalty in blank, and the penalty is then inserted with his consent, but in the absence of the sureties, and without a subsequent delivery or ratification by them. *People v. Organ*, 391.

See ATTACHMENTS, 12-15; ATTORNEY AND CLIENT, 9-11; CORPORATIONS, 34-36; OFFICE AND OFFICERS; SURETYSHIP.

BOUNDARIES.

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BROKERS.

BROKER WHO ACTS FOR BOTH PARTIES IN EFFECTING EXCHANGE OF REAL ESTATE between them, without informing either that he is employed by the other, cannot recover from either commissions for his services; and evidence to show a custom among brokers to charge a commission to both parties in such cases is inadmissible. *Farnsworth v. Hemmer*, 756.

CAVEAT EMPTOR.

See SALES, 4.

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See CRIMINAL LAW, 1; EVIDENCE, 10; SLANDER, 5; WITNESSES, 2, 3.

CHATTEL MORTGAGES.

See MORTGAGES.

COMMON CARRIERS.

1. COMMON CARRIER CANNOT LIMIT HIS COMMON-LAW LIABILITY BY ANY GENERAL NOTICE, but may do so by special contract with shipper; and bill of lading given by carrier on receipt of goods, and accepted by shipper, is a special contract within this rule. *Steele v. Townsend*, 49.
2. COMMON CARRIER CANNOT CONTRACT FOR IMMUNITY FROM CONSEQUENCES OF HIS OWN NEGLIGENCE, or that of his servants or agents, and an exception in a bill of lading will not be construed to have that effect. *Id.*
3. EVIDENCE TENDING TO SHOW THAT "BREAKAGE" COMPLAINED OF DID NOT RESULT FROM PLAINTIFF'S NEGLIGENCE, in action by common carrier for freight, is admissible on behalf of plaintiff, and he may show that articles similar to those specified in the bill of lading were usually in a damaged condition on their arrival. *Id.*
4. WHERE CONTRACT EXISTS BETWEEN COMMON CARRIER AND SHIPPER, LIMITING FORMER'S LIABILITY, and a loss or injury occurs, the burden of proof is on the carrier to show, not only that the cause of the injury is within the exception, but that the injury did not result from the carrier's negligence. *Id.*

5. **CONTRACT OF AFFREIGHTMENT OBLIGES CARRIER, IN ABSENCE OF LEGAL EXCUSE**, to carry the freight to the destined port in the very vessel stipulated in the bill of lading. *Cox v. Foscue*, 69.
6. **TRANSHIPMENT OF FREIGHT, MADE IN ABSENCE OF SUCH NECESSITY AS CONSTITUTES LEGAL EXCUSE**, subjects carrier to liability if the freight be lost. *Id.*
7. **TRANSHIPPING FREIGHT IS NOT EXCUSED BY FACT THAT STEAMBOAT ON INLAND RIVER IS GROUNDING**, where she could relieve herself, with safety and convenience, by temporarily placing a part of her cargo on the bank, and afterwards take it on board again. *Id.*
8. **EXPRESS COMPANY MUST ACTUALLY DELIVER, OR OFFER TO DELIVER, PACKAGE** at the residence or place of business of the consignee, in order to discharge itself from liability as a common carrier. *American Express Co. v. Baldwin*, 389.
9. **EXPRESS COMPANY IS BOUND TO USE ORDINARY CARE** for the safe-keeping of a package if held by it as a bailee or warehouseman. *Id.*
10. **RAILROAD COMPANY UNDERTAKING TO TRANSPORT LIVE-STOCK** is bound to furnish suitable and safe cars, and is responsible for any loss arising from a neglect of duty in this particular. The mere presence of the owner of the stock does not lessen this responsibility, as the cars are necessarily under the control of the agents of the company. *Peters v. New Orleans etc. R. R. Co.*, 579.
11. **LIEN DOES NOT EXIST ON GOODS OF ONE FOR FREIGHT AND CHARGES ON GOODS OF ANOTHER**, shipped by the same bill of lading to the same consignee. *Hale v. Barrett*, 367.
12. **LIEN FOR FREIGHT AND CHARGES IS LOST IF GOODS ARE DELIVERED TO CONSIGNEE**, upon his note therefor, and is not revived if the carrier or his agent afterwards accidentally obtains possession of them. *Id.*
13. **PLAINTIFF MAY PROVE CONTENTS AND VALUE OF LOST BAGGAGE BY HIS OWN OATH**, in an action against railroad company, as common carrier, to recover damages for the loss of his baggage. *Douglass v. Montgomery etc. R. R. Co.*, 76.
14. **MEASURE OF DAMAGES IN ACTION AGAINST COMMON CARRIER FOR FAILURE TO DELIVER MACHINERY TRANSPORTED**, within a reasonable time, is the value of its use during the time it was improperly detained. *Priestly v. Railroad Co.*, 369.
15. **SPECIAL DAMAGES FOR FAILURE OF COMMON CARRIER TO DELIVER MACHINERY TRANSPORTED**, within a reasonable time, may be recovered, under proper notice and allegations. *Id.*
16. **MEASURE OF DAMAGES IN ACTION FOR BREACH OF CONTRACT FOR CARRIAGE OF PASSENGERS** is not only the direct pecuniary loss resulting from the breach of contract, but damages may be recovered for any fraudulent or oppressive conduct on the part of defendants producing great bodily or mental suffering; the question as to what damages are commensurate with the injuries sustained being one for the jury. *Jones v. Steamship Cortes*, 142.

See RAILROADS, 3; SHIPPING.

COMMON LAW.

COURTS OF ONE STATE WILL PRESUME THAT COMMON LAW PREVAILS IN OTHER STATES HAVING COMMON ORIGIN, in the absence of evidence to the contrary. *Connor v. Trawick's Adm'r*, 58.

See MINES AND MINING, 9; REPLEVIN, 1.

CONSTITUTIONAL LAW.

1. TERM "SOVEREIGNTY" IS USED TO EXPRESS the supreme political authority of an independent state or nation, and whatever rights are essential to the existence of this authority are rights of sovereignty, as the right to declare war, make peace, levy taxes, and take private property for public use. *Moore v. Smaw*, 123.
2. RIGHT OF SOVEREIGNTY IS VESTED IN PEOPLE, and is exercised through the joint action of their federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local governments. *Id.*
3. "DUE PROCESS OF LAW" IS RIGHT OF TRIAL ACCORDING to the process and proceedings of the common law, or law in its regular course of administration through courts of justice. *Ex parte Grace*, 529.
4. LEGISLATURE MAY, BY JOINT RESOLUTION, DIRECT SECRETARY OF STATE as to the proper discharge of his official duties. *State ex rel. Brown v. Bailey*, 405.
5. AUTHORITY TO TRY AND FINE DISORDERLY AND LEWD PERSONS, given to a mayor of a municipal corporation by the charter and ordinances of such corporation, is but a police regulation, and does not contravene that provision in a state constitution, which declares the judicial power of the state to be confided to certain officers, among which the mayor of such corporations is not enumerated. *Shafer v. Mumma*, 656.
6. STATE LAW THAT MAKES VALID VOID CONTRACT DOES NOT IMPAIR OBLIGATION OF CONTRACT, within the meaning of the constitution of the United States. *Welch v. Wadsworth*, 236.
7. ACT VALIDATING CONTRACT VOID AS USURIOUS DOES NOT IMPAIR OBLIGATION OF CONTRACT. *Id.*
8. LEGISLATURE, IN PASSING RETROSPECTIVE LAWS, CANNOT DISREGARD those fundamental principles of the social compact which underlie all legislation irrespective of constitutional restraints; and if the act in question is in clear violation of them, it is the duty of the judiciary to hold it abortive and void. The rule is, that although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights, that the action of the legislature cannot be vindicated by any reasonable intentment or allowable presumption, it is the duty of the court to declare it void. *Id.*
9. LAW TENDING TO DELAY COLLECTION OF DEBTS IS INOPERATIVE UPON EXISTING CONTRACTS; because it violates the federal prohibition that no state shall pass any law impairing the obligation of contracts: See Const. U. S., art. 1, sec. 10. *Scobey v. Gibson*, 490.
10. IN SO FAR AS IT IMPOSES TAX UPON BILLS OF LADING for the transportation of gold or silver from any point in this state to any point without the state, the act of the California legislature of April, 1858, amending the act of April, 1857, "to provide for the support of the government of this state from a tax to be levied and collected from foreign and inland bills and other matters," is in conflict with that clause of the constitution of the United States which declares that "no state shall, without the consent of the congress, lay imposts or duties on imports or

experts, except what may be absolutely necessary for executing its inspection laws," and hence the provisions of the act must be restricted to the enforcement of the tax against instruments other than such bills of lading. *Brunagin v. Tillinghast*, 176.

21. GENERAL RULES OF STATUTORY CONSTRUCTION MUST YIELD TO CLEAR INTENTION OF LEGISLATURE sufficiently expressed. *Welch v. Wadsworth*, 236.
22. RETROSPECTIVE ACT CANNOT AFFECT CONTRACT MERGED IN JUDGMENT AT TIME OF ITS PASSAGE. *Id.*
23. RETROSPECTIVE ACT MAY AFFECT CONTRACT UPON WHICH SUIT HAS BEEN BROUGHT and judgment by default rendered at the time of its passage, where the case is still pending on defendant's motion to be heard in damages, for the contract does not become merged in judgment until the extent of the defendant's liability under the contract is determined by final judgment. *Id.*
24. IMPRISONMENT OF DEBTOR, in a manner or under circumstances not fully warranted by section 19 of article 1 of the constitution of 1857, cannot be authorized by statute: See Rev. of 1860, c. 126. *Ex parte Grace*, 529.
25. FOR CONVENIENCE, STATE MAY CHANGE LEGAL REMEDIES; may vary the times of holding courts, shift jurisdiction from one to another, change forms of action, of pleadings, and of process, etc.; and may incidentally delay somewhat the collection of given debts; but the legislature cannot, under guise of legislating upon the remedy intentionally, in effect, impair the obligation of contracts. *Scobey v. Gibson*, 490.
26. LEGISLATURE MAY CHANGE REMEDIES SO LONG AS IT DOES NOT SUBSTANTIALLY IMPAIR THEM. *Holloway v. Sherman*, 537.
27. PROCEDURE REGULATING REMEDY BEFORE JUDGMENT MAY BE CHANGED by giving defendant an enlarged time for answering, if it leaves plaintiff's remedy, in other respects, just as it existed under previous laws. *Id.*
28. ACT TO REGULATE FORECLOSURE OF MORTGAGES BY GIVING DEFENDANT NINE MONTHS ADDITIONAL TIME IN WHICH TO ANSWER does not violate the constitutional prohibition that no law shall be passed impairing the obligation of contracts. *Id.*
29. REMEDY AT TIME OF BRINGING SUIT MUST BE FOLLOWED; not a remedy in force when the cause arose but which has since been repealed. *Flowers v. City of Jeffersonville*, 468.
30. LEGISLATURE MAY CHANGE LEGAL REMEDIES, so it does not substantially impair them. *Id.*
31. REMEDY FOR COLLECTING DUES FOR STREET IMPROVEMENTS by precept from the council, mayor, and clerk of the city, is constitutional. *Id.*
32. ACT DIRECTED TOWARDS REMEDY MAY IMPAIR OBLIGATION OF CONTRACTS, and such legislation does do so, where it deprives a party of a remedy substantially as efficient as that existing when the contract was made. *Scobey v. Gibson*, 490.
33. ACT PROVIDING FOR REDEMPTION OF REAL PROPERTY SOLD UPON EXECUTION, ETC., so far as the same is intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with the federal constitution, which prohibits the passage of any law impairing the obligation of contracts: See act of June 4, 1861; Acts Special Sess. 1861, c. 41, p. 79; Const. U. S., art. 1, sec. 10. *Id.*

See INSOLVENCY, 2.

24. ANSWER OF NUL TIEL CORPORATION PUTS IN ISSUE the existence *de facto* of a corporation under an authority sanctioning such a corporation *de jure*, and proof is limited to this fact. *Id.*
25. UNDER ANSWER OF NUL TIEL CORPORATION, MERE IRREGULARITIES IN ORGANIZATION cannot be shown, where there is no defect of power. *Id.*
26. ANSWER DENYING EXISTENCE OF CORPORATION PLAINTIFF, which is shown to have once existed, should particularly set forth the manner in which the corporate powers ceased. *Id.*
27. PARTY TO CONTRACT WITH CORPORATION DE FACTO IS ESTOPPED, in a suit upon such contract, to deny its *de facto* organization at the date of the contract. *Id.*
28. PARTY TO CONTRACT WITH PRETENDED CORPORATION, organized without law, or under an unconstitutional one, is not estopped to deny its existence at the date of the contract. *Id.*
29. WHETHER PLAINTIFF IS CORPORATION OR PARTNERSHIP, where the plaintiff's name *prima facie* imports a corporation, is a question which may be raised by an answer alleging want of parties in interest in the suit. *Id.*
30. GENERAL DENIAL PLEADED TO SUIT BY CORPORATION ADMITS the *de facto* existence of the corporation. *Harrison v. Martinsville and Franklin R. R. Co.*, 447.
31. WHERE POWER IS CONFERRED UPON PUBLIC OFFICERS by legislative enactment, such power can be executed by them only in the way directed by the law, and unless the law granting the power is strictly complied with the acts of the officers are void. *Mayor etc. of Baltimore v. Porter*, 686.
32. CITY COUNCIL CAN ONLY EXECUTE POWER conferred upon it by statute in the way in which all its powers are executed, by adopting an ordinance for that purpose, prescribing the officer by whom, and the manner in which, the objects of the law should be accomplished. *Id.*
33. ORDINANCE PASSED BY CITY COUNCIL, ratifying or confirming an act of an officer after it has been performed by him under a law which provided that the city council should provide for the execution of the act which was performed by the officer, is void, and cannot give vitality to such act; being performed without authority, it is not binding, and cannot be made binding by the city council afterwards. *Id.*
34. MUNICIPAL AUTHORITIES WHO ARE AUTHORIZED TO ISSUE BONDS GENERALLY may, without express authority, issue such bonds in lieu of others overdue, and they are the judges of the propriety of such action. *City of Quincy v. Warfield*, 330.
35. IF MUNICIPALITY ONLY AUTHORIZED TO ISSUE BONDS BEARING EIGHT PER CENT INTEREST issues bonds bearing twelve per cent interest, such bonds will be valid *pro tanto*, and will be binding on the city, with interest to be calculated at eight per cent. *Id.*
36. WHERE RECOMMENDATION OF FINANCE COMMITTEE OF CITY COUNCIL IS NECESSARY to authorize issuance of bonds, and nothing appears to the contrary, it will be presumed that such recommendation was made. *Id.*
37. CITY IS NOT LIABLE FOR ASSAULT AND BATTERY COMMITTED BY POLICE OFFICERS in an attempt to enforce a city ordinance. Police officers are public officers, and not the agents or servants of the city. *Batrick v. City of Lowell*, 721.
38. CITY DOES NOT BECOME LIABLE FOR ASSAULT AND BATTERY COMMITTED BY ITS POLICE OFFICERS in enforcing a city ordinance, because it authorizes its solicitor to appear and defend a suit against the police officers.

This does not constitute a ratification and adoption of the acts of the officers. *Id.*

39. ACTION ON CASE FOR NEGLIGENCE LIES AGAINST MUNICIPAL CORPORATION, for the recovery of damages resulting from its willful neglect to perform a duty imposed by law. *Clayburgh v. City of Chicago*, 348.
40. WHERE CITY REFUSES TO COLLECT ASSESSMENT LEVIED TO COMPENSATE OWNER OF LAND for damages sustained by him by reason of opening a street over his lot, he has his election to sue in trespass or case, or to proceed for the value of the land. *Id.*

See GAS COMPANIES; QUO WARRANTO.

COSTS.

See SURETYSHIP, 2.

CO-TENANCY.

See ATTACHMENTS, 5; EJECTMENT, 1; LANDLORD AND TENANT, 6; PARTITION.

COURTS.

COURT CANNOT ALTER RECORD OF ITS PROCEEDINGS, BUT MAY CORRECT ERRORS so that such material issues may be formed as will settle the pending controversy. *Heaton v. Cincinnati etc. R. R. Co.*, 430.

See CONTEMPTS

COVENANTS.

1. COVENANT OF SEizin IS BROKEN AS SOON AS MADE, where the grantor, at the time of the conveyance, has no title. The grantee is not bound to wait until he has been disturbed in his possession, but may purchase in the outstanding title, and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same. To recover more than nominal damages, the *onus* is on him to show what the outstanding title was worth; the fact that he paid a certain sum for it is not evidence of its value. *Pate v. Mitchell*, 114.
2. COVENANT RUNS WITH LAND, WHERE HUSBAND AND WIFE have separated, and the husband enters into a contract with a third person, who covenants to save the husband, his heirs and representatives, free from any claim of the wife to maintenance, alimony, or dower, in consideration of a conveyance by the husband to him of certain property in trust for the use and benefit of the wife. *Gaines v. Poor*, 559.

See VENDOR AND VENDEE, 1, 3.

CRIMINAL CONVERSATION.

INADMISSIBLE EVIDENCE IN ACTION FOR CRIM. CON.—In such an action, defendant cannot prove facts going to show that there was no affection existing between the plaintiff and his wife at and before the time of the alleged seduction. Neither will evidence be heard that plaintiff, in witness's opinion, did not furnish his wife or family with a suitable house to live in. *Dallas v. Sellers*, 489.

CRIMINAL LAW.

1. EVIDENCE OF GENERAL BAD CHARACTER FOR CHASTITY OF FEMALES WHO FREQUENT HOUSE is competent to show that the house is of bad

repute, on indictment for keeping a house of ill-fame. *Commonwealth v. Gannett*, 693.

2. EVIDENCE THAT THERE WAS NO NOISE OR DISTURBANCE OF PEACE IN HOUSE, or annoyance to the neighborhood, is immaterial, and properly excluded on indictment for keeping a house of ill-fame. *Id.*
3. INDICTMENT FOR KEEPING HOUSE OF ILL-FAME WILL LIE, though defendant merely aided and assisted others in keeping the same. *Id.*
4. IN MISDEMEANORS, ALL WHO PARTICIPATE IN CRIMINAL ACT ARE DEEMED TO BE PRINCIPALS. *Id.*
5. BOX FOUND IN POSSESSION OF PRISONER ACCUSED OF THEFT, and claimed to have a certain relation to the theft, which, on examining it before the jury, is found to contain a secret place in the lid in which are certain bank bills supposed to be counterfeit, may be delivered to the jury as it is, and be by them taken to the jury-room. *State v. Stebbins*, 223.
6. EVIDENCE OF VOLUNTARY DRUNKENNESS NOT ADMISSIBLE IN LARCENY. In a prosecution for larceny, evidence that the accused was in a state of voluntary intoxication just before and at the time of the commission of the alleged crime, is not admissible for the defense. *Dawson v. State*, 439.
7. SIMPLE INTOXICATION MAY BE GIVEN IN EVIDENCE TO REBUT MALICE, where that is an ingredient of the charge, and this in cases either civil or criminal; but this principle does not extend to the ingredient of intention. *Id.*
8. ASSAULT WITH INTENT TO MURDER may be committed without using a weapon that might be likely to produce death, although such intention is usually manifested by the use of a deadly weapon. *Monday v. State*, 314.
9. DEFENDANT CHARGED WITH COMMISSION OF RAPE MAY BE CONVICTED OF ASSAULT WITH INTENT TO COMMIT RAPE, upon evidence showing that he intended to gratify his passions upon the person of the female, notwithstanding any resistance on her part, and that the offense was consummated under circumstances satisfying the jury that the assault was made without her consent. And the jury may do this where they are not satisfied that the resistance on her part was so continued and persistent as to prove guilt of the higher crime, when he succeeds in having carnal knowledge. *State v. Cross*, 519.
10. FEMALE'S FAILURE TO MAKE ANY OUTCRY when a violation of her person is attempted, and the fact that her garments do not get injured in the struggle with her assailant, as well as the fact that she keeps the injury silent for several days, tend strongly to show consent, but are not conclusive, and should always be considered in connection with her age and intelligence. *Id.*
11. DIFFERENCE BETWEEN CONSENT AND SUBMISSION IN RAPE CASES.—Consent involves submission; but a mere submission by no means necessarily involves consent, as where a child is in the power of a strong man. *Id.*
12. INFORMATION MAY BE AMENDED, AFTER JURY IS IMPANELED AND SWORN, and the trial has commenced, by erasing the word "Norwalk" in the description of a railroad company and inserting in lieu thereof the word "New Haven," where the place on the railroad at which the crime was alleged to have been committed was more fully described in said information as being between Westport and Norwalk, particularly when the information contains other counts, quite sufficient to proceed with the trial upon, which had not been altered. *State v. Stebbins*, 223.

13. IN CONNECTICUT, ONE GOOD COUNT IS SUFFICIENT, upon a general verdict, either in a criminal or a civil case. *Id.*
 14. WHERE INFORMATION FAILS THROUGH VARIANCE, VERDICT OF ACQUITTAL DOES NOT BENEFIT DEFENDANT, for a new information may be filed immediately, avoiding the variance. It is therefore customary for our courts to allow the prosecutor to amend and go on with the trial without a re-examination of the witnesses, unless such re-examination is claimed by the prisoner. *Id.*
 15. TESTIMONY AS TO FACT WHICH IS IN ITSELF RELEVANT AND CONNECTED WITH ACCUSED by the testimony of an accomplice, is admissible as direct evidence, even though it might not be admissible for the purpose of corroborating the testimony of the accomplice. *Id.*
 16. NO RULE OF LAW ABSOLUTELY REQUIRES TESTIMONY OF ACCOMPLICE TO BE CORROBORATED, but the jury may, if satisfied thereby of the guilt of the accused, convict on such testimony alone. *Id.*
 17. TESTIMONY OF ACCOMPLICE IS OF SUSPICIOUS CHARACTER and calls for scrutiny on the part of the jury, and for a particular caution to the jury on the part of the judge in his charge; and the neglect to give such a caution is a clear omission of judicial duty. *Id.*
 18. DECLARATIONS OF PERSON ON WHOM ASSAULT WAS MADE, uttered at or immediately after the assault, are admissible as parts of the *res gestae* in a criminal case. *Monday v. State*, 314.
 19. PUBLIC EXCITEMENT PREVAILING AGAINST ONE ACCUSED OF CRIME, in the county where it was committed, added to other causes insufficient in themselves, ought to turn the scale in favor of a motion for a continuance. *Maddox v. State*, 307.
 20. WHEN PRINCIPLES OF JUSTICE REQUIRE POSTPONEMENT OF CRIMINAL TRIAL, it is the duty of the court to see that the trial is not precipitated to the injury of defendant. *Id.*
 21. JUDGE OF SUPERIOR COURT HAS POWER TO REVISE AND INCREASE SENTENCE imposed upon a convict, during the same term of court, and before the original sentence has gone into operation, or any action been had upon it. *Commonwealth v. Weymouth*, 776.
- See CRIMINAL CONVERSATION; JURY AND JURORS, 1-3; PLEADING AND PRACTICE, 32.

CUSTOM.

CUSTOM OR USAGE TO BE LEGAL AND VALID MUST BE REASONABLE and consistent with good morals and sound policy. *Farnsworth v. Hemmer*, 756.

DAMAGES.

1. THERE ARE MANY CONSEQUENTIAL DAMAGES THAT MAY HAPPEN TO OTHERS from the legitimate use of one's own property for which there is no redress. Such a loss is *damnum absque injuria*. *Wabash and Erie Canal v. Spears*, 444.
2. THERE ARE CONSEQUENTIAL INJURIES RESULTING FROM USE OF ONE'S OWN OR OF ANOTHER'S PROPERTY, for which damages may be recovered of the person causing them. An unauthorized obstruction or nuisance in a street or highway, occasioning special damage, constitutes such injuries. So might a nuisance injurious to the health and comfort of others, erected on one's own land. *Id.*

3. **INJURIES BY BACKING WATER** seem to be embraced within the constitutional inhibition against injuring property by legislative authority, without making compensation. *Id.*
 4. **DIVERSION OF SURFACE WATER FROM LAND OF ANOTHER**, by excavations on one's own land; and the backing of water, by means of dams, etc., upon the lands of another, were injuries for which an action lay at common law. *Id.*
 5. **IN SUIT AGAINST TRUSTEES OF WABASH AND ERIE CANAL TO RECOVER DAMAGES** occasioned by overflow of plaintiff's land, produced by said trustees' action in raising a dam across the Wabash river, and in cutting waste-ways through embankments, during the period between 1848 and 1854, it was held that the damages sued for were not occasioned by the taking of the land or materials of the plaintiffs, in the sense of the internal-improvement act of 1836, and were not recoverable in the special mode therein prescribed; but were consequential damages, recoverable in an action on the case at law, and that the two years' limitation for their recovery did not apply. *Id.*
- See **COMMON CARRIERS**, 13, 16; **CONTRACTS**, 11; **EMINENT DOMAIN**; **EQUITY**, 2; **HIGHWAYS**, 5; **NEGLIGENCE**, 1; **PLEADING AND PRACTICE**, 3; **REPLEVIN**, 4-6; **VENDOR AND VENDEE**, 2-6.

DEATH.

SUPPOSED DEATH OCCASIONED BY SHIPWRECK, earthquake, war, plague, explosion, and like perils, is within the exclusive province of the court to determine, by the exercise of a sound discretion, founded on the facts of each particular case. *Succession of Vogel*, 571.

DEBTOR AND CREDITOR.

1. **WHERE DEBTOR'S SALE OF PROPERTY IS FRAUDULENT** as to creditors, the purchaser cannot be affected by the debtor's fraud, unless he participated in it by assisting the former to put his property out of the reach of his creditors, and appropriating it to himself with a knowledge of the debtor's fraudulent design, and with intent to further the accomplishment of such design. *Christian v. Greenwood*, 104.
2. **DEBTOR MAY PREFER AND SECURE CREDITOR** by a voluntary sale to him of his property, although the preferred creditor knew that the debtor's object in making the sale was to deprive the other creditors of the means of collecting their debts. In such case, the preferred creditor's conduct would not be held fraudulent, as it would be presumed that he acted to secure himself, and not to defraud the other creditors. *Id.*
3. **CREDITOR BUYING PROPERTY OF INSOLVENT DEBTOR** to secure his own demand has the same equity that other creditors have. Each has an equitable interest in the debtor's property; and the legal title conjoined to an equity will overcome a mere equitable interest; but the buyer must allow a fair price for the property, and must not buy more than is necessary for his own protection. *Id.*
4. **WHERE DEBTOR'S SALE IS FRAUDULENT AS TO OTHER CREDITORS**, a purchasing creditor will be held to a participator in the fraud, if he have notice of it, and still deal with him, thereby affording him the means to make his fraudulent efforts against his creditors successful; and this, notwithstanding he may have paid a full price for the property. *Id.*

3. **GRANTEE WHO HAS KNOWLEDGE OF FRAUD** of his grantor is held responsible for it to the extent of his dealing with him, and a fraudulent intent will be presumed on the part of the grantee, as well as against the grantor. *Id.*

See ATTACHMENTS; CONSTITUTIONAL LAW, 14; FRAUDULENT CONVEYANCES.

DEDICATION.

1. **INTENTION TO DEDICATE TO PUBLIC USE** must be signified in a manner not liable to doubt or misconstruction, by something more than symbols of uncertain import or fanciful adornments with which it has pleased a draughtsman to decorate a plan of property. *Heirs of David v. City of New Orleans*, 586.
2. **RULE FOR TESTING DEDICATION TO PUBLIC USE**, to be inferred from a plan, is, that words indicative of an intention to give should be found on the plan, in order to clothe it with such an effect, and moreover, that the public should have accepted the dedication by using the ground for the purposes indicated. *Id.*
3. **IN DEDICATING LAND TO PUBLIC USE, NO PARTICULAR FORM OR CEREMONY** is necessary. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation. *Id.*
4. **DEDICATION TO PUBLIC USE AS HIGHWAY** is not fulfilled by converting the land into a site for a market. *Id.*
5. **MARKET-HOUSE** IS NOT NECESSARILY PUBLIC PROPERTY, but may be the subject of private ownership. *Id.*
6. **DEDICATION TO PUBLIC USE** is not established where neither an original grant, nor any act of plaintiffs or of their authors equivalent to a grant, of the *locus in quo*, for a public highway, is proved, and the assent of the owner of the land, and its acceptance and use for the purposes of the dedication, is not shown. *Id.*

DEEDS.

1. **PRECEDENT DEBT CONSTITUTES VALUABLE CONSIDERATION FOR CONVEYANCE.** *McMahan v. Morrison*, 418.
2. **WHERE DEED CONTAINS TWO INCONSISTENT DESCRIPTIONS OF LAND CONVEYED**, the grantee is entitled to hold that which is most beneficial to him. *Esty v. Baker*, 616.
3. **WHERE SOME PARTICULARS OF DESCRIPTION OF ESTATE CONVEYED DO NOT AGREE**, those which are uncertain, and liable to errors and mistakes, must be governed by those which are more certain. *Id.*
4. **DEED CONVEYING GRIST-MILL "WITH THE LAND AND PRIVILEGES**, where the same is situated, necessary for and attached to said grist-mill, hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with the said grist-mill and privilege," conveys all the land and privilege not before sold by the grantors, and connected with the mill and privilege, and not merely what is strictly necessary for and attached to the mill; but if the parties have, by their subsequent acts and occupation, adopted a different construction of the deed, treating the grant as embracing not all the lands and privilege on the dam not previously sold, but all the lands and privilege connected with the grist-mill not previously sold, the court will not interfere with their construction. *Id.*

6. QUITCLAIM DEED ONLY PURPORTS TO RELEASE AND QUITCLAIM WHATEVER INTEREST the grantor possesses at the time, and does not amount to the affirmance by him of the possession of any title, nor does it preclude him from subsequently acquiring a valid title, and attempting to enforce it. *San Francisco v. Landon*, 187.
8. GRANTEE IN QUITCLAIM DEED MAY DENY THAT HE RECEIVED ANY ESTATE by the deed. *Id.*
7. GRANTEE OF LAND IN FEE MAY DENY THAT HE RECEIVED any estate by the conveyance. With the execution of the conveyance, the transaction between the parties is closed, and thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor, nor to maintain the validity of his title. *Id.*
9. POSSESSION OF DEEDS IS OF LESS CONSEQUENCE IN THIS COUNTRY THAN IT FORMERLY WAS IN ENGLAND, because of our recording acts. But the legal right to them has probably not changed; and even if it has, as to prior deeds, it still remains as to the deed between the immediate grantor and grantee. *Wilson v. Rybolt*, 486.
9. POSSESSION OF TITLE DEEDS MAY BE RECOVERED UNDER CODE ACTION FOR RECOVERY OF PERSONAL CHATTELS, and title deeds may be recovered in such action in a justice's court, as the jurisdiction of justices of the peace, within a limited sum, is, as to the character of the articles sought to be recovered, equally extensive with that of the higher courts. *Id.*
10. TITLE DEED IS PERSONAL CHATTEL, BUT IS SO CONNECTED WITH and essential to the ownership of real estate, that it descends with it to the heir. *Id.*
11. DELIVERY OF TITLE DEEDS, WHERE NECESSARY, WAS COMPELLED by chancery from a very early date. Later, they became recoverable in an action of detinue. *Id.*
12. INSTRUMENT SHALL BE SO CONSTRUED AS TO PASS ESTATE, when such was the intention of the party executing it. This is the modern rule. *Thornton v. Mulquinne*, 548.
13. MERE RELEASE OF RIGHT TO ONE NOT SEISED or in possession of the estate passed nothing as a release at common law. *Id.*
14. "ESTATE" INCLUDES EVERY KIND OF PROPERTY. In a will, it passes the fee without words of inheritance. It carries everything unless tied down by particular expressions. *Id.*
15. ALTHOUGH INSTRUMENT IS NOT CALCULATED TECHNICALLY TO EXHIBIT INTENTION of grantor to convey and in the grantee to take, yet it should be made to operate in some other way to effect such purpose where it is apparent that such intention existed. *Id.*
16. EXAMPLE OF DEED OF RELEASE SUFFICIENT TO PASS ESTATE.—An intestate having died without issue, his father, who was his sole heir at law, executed to his son's widow the following release or relinquishment: "I, P. T., sen., do hereby release and relinquish all and every claim and demand which I may have against the estate of P. T., jun., late of Jackson county, deceased; and also relinquish all my right as heir to the above estate to and in favor of A. T., widow of the deceased." *Held*, 1. That it was not void for want of a consideration, or a description of the property conveyed, or as a release unsupported by a precedent estate in the releasee; 2. That it was sufficient to pass the entire interest of the grantor, as heir, in the real as well as the personal estate of the deceased. *Id.*

See ATTORNEY AND CLIENT, 2; FRAUDULENT CONVEYANCES; GIFTS, 2; MORTGAGES; PUBLIC LANDS, 6-8; REALTY.

DEMAND.

See CONTRACTS, 9; CORPORATIONS, 7.

DEPOSITIONS.

1. DEPOSITION OF PARTY MAY BE TAKEN, AS IN CASE OF OTHER WITNESSES, when he is competent to testify in his own behalf. *Douglas v. Montgomery etc. R. R. Co.*, 76.
2. DEPOSITIONS ARE ADMISSIBLE BY FORCE ONLY OF STATUTES under which they are allowed to be taken, and are inadmissible unless there has been a full compliance with the actual and positive requirements of the law. *Simpson v. Carleton*, 707.
3. DEPOSITION IS INADMISSIBLE WHERE CAPTION FAILS TO SET FORTH, after stating that the deponent was sworn to testify the truth, the whole truth, and nothing but the truth, that he was sworn to do so "relating to the cause for which the deposition is taken," as provided by statute. *Id.*
4. WHERE PARTY GIVES NOTICE OF TAKING TWO DEPOSITIONS IN DIFFERENT PLACES AT SAME HOUR of the same day, so that the opposite party cannot be present at both places to cross-examine the witnesses, the latter may elect which examination he will attend, and the deposition taken at the other place must be suppressed. *Hankinson v. Lombard*, 348.

DETINUE.

DETINUE AT COMMON LAW DEFINED. *Wilson v. Rybolt*, 486.

See DEEDS, 11; REPLEVIN, 2, 3.

DEVISES.

See WILLS.

DOWER.

WHERE, ON APPLICATION OF WIDOW FOR DOWER, COMMISSIONERS ARE APPOINTED by the judge of probate, who publicly assign and set it out to her by metes and bounds, and she immediately enters upon the premises thus assigned to her, and continues in possession of the same, by herself and her lessee, for more than twenty years, without objection, the inference is legitimate that the dower was thus set out to her with the knowledge and consent, if not by the direct procurement, of the heirs at law, or those who were entitled to the freehold at the time, notwithstanding the fact that such commissioners made no return to the probate court. Under such circumstances and after such a lapse of time, it would be inequitable to disturb the assignment, which is not even now alleged to be unjust or unreasonable. *Austin v. Austin*, 597.

See HUSBAND AND WIFE, 5.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 3.

DURESS.

See CONTRACTS, 3.

EASEMENTS.

See HIGHWAYS, 1.

EJECTMENT.

1. IN EJECTMENT BY ONE TENANT IN COMMON AGAINST ANOTHER, the defendant, if he intends to deny the ouster, should apply, upon affidavit, for a special rule to confess lease, entry, and not ouster. By entering into a general consent rule, he thereby admits the ouster, and cannot afterwards deny it. *Tongue's Lessee v. Nutwell*, 649.
2. IN EJECTMENT, DEFENDANT ADMITS IDENTITY OF PREMISES IN CONTROVERSY, IF HE DOES NOT TAKE DEFENSE ON WARRANT, and cannot deny the location of plaintiff's pretensions as set out in his *scry.* under the general issue. *Id.*
3. IN EJECTMENT, PLAINTIFF MUST SHOW that he has a *bona fide* subsisting claim before he can use the name of a third person as lessor, and that there is a connection between his title and the party upon whose demise he seeks to recover, or that he has the authority of the person in whom the paramount title is vested, to institute the suit in his name. *Keeter v. Smith*, 303.
4. JUDGMENT IN EJECTMENT IS CONCLUSIVE AGAINST DEFENDANT FOR ALL PROFITS accrued since the date of the demise stated in the declaration in ejectment; but if the plaintiff sues for antecedent profits, the defendant may make a new defense. *City of Apalachicola v. Apalachicola Land Co.*, 284.
5. RIGHT TO MESNE PROFITS IS NECESSARY CONSEQUENCE OF RECOVERY IN EJECTMENT. *Id.*
6. PLAINTIFF, AFTER RECOVERY IN EJECTMENT, CANNOT TURN HIS ACTION AT LAW FOR MESNE PROFITS INTO SUIT IN EQUITY, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances, including all cases which involve an equity, which the plaintiff cannot make available at law. *Id.*
7. SUIT IN EQUITY LIES FOR ACCOUNT OF MESNE PROFITS, after recovery in ejectment, where bill shows right to discovery and relief in a matter connected therewith, for equity, having obtained jurisdiction to this extent, will proceed to settle finally the whole merits of the cause. *Id.*
8. CITY, LIKE INDIVIDUAL, HAS RIGHT TO RECOVER MESNE PROFITS after recovering in ejectment possession of street and wharves erected by defendant at the end thereof. *Id.*

See MORTGAGES, 6, 7.

EMINENT DOMAIN.

1. IN ACTION AGAINST CITY TO RECOVER FOR REAL ESTATE TAKEN FOR PUBLIC STREET, the city will be estopped from urging that the commissioners appointed by it to ascertain and assess the damages were not disinterested freeholders of the city. It cannot be allowed to avail itself of its own wrong. *City of Chicago v. Wheeler*, 342.
2. CITY, BY PROCEEDING TO ACT UPON REPORT OF COMMISSIONERS APPOINTED BY IT to assess damages for land taken for public street, waives all objection to irregularities in the selection or appointment of such commissioners. *Id.*
3. OMISSION OF DOLLAR-MARK FROM SOME PARTS OF ASSESSMENT, made in proceedings to open a street, will not invalidate the assessment, if there are sufficient evidences on other parts of the roll by which to determine the amounts to be paid. *Id.*

4. **INTEREST SHOULD BE ALLOWED ON AMOUNT OF DAMAGES AWARDED FOR LAND** taken for opening a public street, where such amount remains unpaid for two years after the confirmation of the report of the commissioners making the award. *Id.*
5. **EQUITY WILL RELIEVE AGAINST APPRAISEMENT OF LAND TAKEN UNDER CHARTER**, where the appraisers acted in the absence of the owner, and upon false information, and made an appraisal clearly wrong. *Wells v. Bridgeport Hydraulic Co.*, 250.
6. **EQUITY WILL RELIEVE AGAINST APPRAISEMENT WHERE APPRAISERS WERE MISLED** by false representations, whether the representations were fraudulently made or not. *Id.*
7. **WHERE WRONG APPRAISEMENT OF DAMAGES FOR TAKING PROPERTY UNDER CHARTER IS MADE THROUGH APPRAISERS BEING MISLED**, fraudulently or otherwise, upon a bill for relief the court will decree a new appraisal, and until such appraisal is made and the amount paid, will enjoin the respondent from using the former appraisal as a defense to the petitioner's action at law for his damages. *Id.*

EQUITY.

1. **WHERE THERE IS REMEDY PROVIDED BY LAW**, courts of equity cannot give relief. *O'Neal v. Virginia etc. Bridge Co.*, 669.
 2. **CLAIMS FOR DAMAGES WILL NOT BE ENFORCED**, in equity, if there is no other cause of complaint to bring the case within equity jurisdiction, except the damages inflicted. *Atlanta etc. R. R. Co. v. Speer*, 305.
 3. **COURT OF CHANCERY HAS POWER TO PREVENT OFFICER FROM DOING ACT NOT AUTHORIZED BY LAW**. *Mayor etc. of Baltimore v. Porter*, 686.
- See **CONTRACTS**, 2; **EJECTMENT**, 6-8; **EMINENT DOMAIN**, 5, 6; **INJUNCTIONS**; **JUDGMENTS**, 5, 13; **REFEREES**, 2; **SPECIFIC PERFORMANCE**; **TAXATION**, 5, 7; **TRUSTS**.

ESTATES.

See **LANDLORD AND TENANT**.

ESTATES OF DECEDENTS.

1. **ADMINISTRATION MUST BE HAD** upon an estate of a decedent in order to derive title to his personal effects. *Smith v. Wilson*, 665.
2. **IF PETITION BY ADMINISTRATOR FOR SALE OF REAL ESTATE STATES ENOUGH TO REQUIRE COURT TO ACT**, the orders and decisions of the court in the premises are binding until reversed, and cannot be attacked collaterally. *Iverson v. Loberg*, 364.
3. **PETITION BY EXECUTOR FOR SALE OF REAL ESTATE OF DECEDENT** must set forth the amount of the personal property of the estate, which has come to his hands, otherwise an order of sale made by the probate court and the sale made thereunder are void. The mere fact that an account of such personal estate is filed, at or about the date of filing the petition, or is found among the papers of the probate proceedings, is not sufficient, unless such account is referred to in the petition so as to form a part of it for the purpose of the reference. *Gregory v. Taber*, 219.
4. **TO SUSTAIN SALE OF DECEDENT'S REAL ESTATE UNDER ORDER OF PROBATE COURT**, the petition for the sale must state the facts required by the one hundred and fifty-fifth section of the probate act. Unless the petition states those facts, the court does not acquire jurisdiction of the matter, and has no power to confirm the sale or to impart validity to it. *Id.*

5. PROBATE COURT CAN CONFIRM THOSE SALES ONLY THAT ARE MADE UNDER ORDERS which it had jurisdiction to make. *Id.*
6. ADMINISTRATOR'S SALE OF DECEDENT'S REAL ESTATE CANNOT BE UPHOLD, under the Iowa statute, where the probate records show that the administrator did not take the required oath, that lawful notice was not given of the sale, and in the absence of evidence that the premises were sold at public auction. These defects alone are fatal to the purchaser's title, particularly where the records show that no petition for the sale was filed, and where they do not show that any sale was ever made, except the fact that an administrator's deed was executed, but which did not show that it was made pursuant to a sale ordered by the probate court. *Thornton v. Mulquinne*, 548.
7. BOND GIVEN BY ADMINISTRATOR BEFORE SALE OF HIS INTESTATE'S REAL ESTATE MUST BE APPROVED in writing by the judge of probate. But where the evidence fails to show affirmatively that the bond was so approved, and the contrary does not appear, if the record shows that all the other steps required by law were accurately taken; if the law required the bond to be approved by the judge before it could be legally filed, and the bond was in fact filed; if the sale was a public one, and the purchaser immediately entered under his deed, and has held undisturbed possession for more than twenty years—the law will authorize the conclusion that all was done that was required to give such purchaser a perfect title. *Austin v. Austin*, 597.

See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL.

1. PRINCIPLE THAT ONE WHO STANDS BY AND SEES ANOTHER INVEST MONEY IN PROPERTY cannot afterwards assert any claim he may have to such property unless he discloses his own claim thereto to the person investing at the time, does not apply where both parties are ignorant of the rights of the former, and the means of knowledge of such rights is equally open to each. If the means of knowledge is closed to the investor, the principle is otherwise in favor of one who is deceived or misled by such want of notice. *Tongue's Lessee v. Nutwell*, 649.
2. PERSON IS NOT ESTOPPED WHO, HAVING TITLE TO LAND depending upon the construction of a will, without any knowledge of his rights, stands by and sees another lay out money and make large investments in the property and does not give notice of his claim. *Id.*

See TAXATION, 11.

EVIDENCE.

1. INSTRUMENT IN WRITING, UPON WHICH ACTION IS BROUGHT, IS ADMISSIBLE IN EVIDENCE, whether it be the original or not, if its execution is admitted, by not being denied by affidavit, as required by the statutes of Illinois. *Grinold v. Trustees of Peoria University*, 361.
2. EVIDENCE OF PART OF CONVERSATION HELD OR ACTS DONE, contemporaneous with an alleged gift, the matter in dispute is admissible as part of the *res gesta*. *Bragg v. Massie's Adm'r*, 82.
3. SECONDARY EVIDENCE OF JUDICIAL RECORD cannot be received until the original is shown to have existed, and to be now lost, mutilated, or destroyed, or otherwise incapable of being produced. *Smith v. Wilson*, 668.

4. ENTRY UPON EXHIBITION ARRESTED BY DEFENDANT filing a claim of illegality, made by the sheriff, is evidence of the facts recited therein in an action by such sheriff for the use of others upon the illegality bond. *Janes v. Horton*, 300.
5. CROSS-EXAMINATION OF AGENT OF DEFENDANT AS TO ACTS AND DECLARATION which there was no proof he had authority to make relates to collateral matters, and the answers of the witness are therefore conclusive upon the plaintiff. *Fletcher v. Boston etc. R. R.*, 695.
6. ANSWERS OF WITNESS MADE UPON CROSS-EXAMINATION AS TO COLLATERAL MATTERS are conclusive, and he cannot be contradicted, and if evidence be admitted for this purpose, a new trial may be granted. *Id.*
7. WITNESS WHO WILLFULLY CONTRADICTS HIMSELF IN MATERIAL PART OF HIS TESTIMONY, for the purpose of concealing the truth, is unworthy of belief, except so far only as he is supported by other evidence in the case; but if a contradiction occurs through inadvertence, or in reference to some matter immaterial to the issue, such a contradiction will not of itself render his evidence unworthy of credit. *Crabtree v. Hagenbaugh*, 324.
8. JURY SHOULD NOT BE DIRECTED TO REJECT ALTOGETHER EVIDENCE OF WITNESS, if he has testified willfully false as to any fact. Such an instruction is too broad. If he so testifies to a material fact, and there is no circumstance in the case tending to corroborate his evidence, the jury have the right to reject all of his evidence as unworthy of credit; but they should not reject such portions of it as may be corroborated by other unobjectionable evidence in the cause. *Id.*
9. COURT MAY CALL JURY'S ATTENTION TO FACT THAT DEFENDANT DID NOT TESTIFY in the case, and may instruct them that they may consider that fact and give to it such weight as they think it deserves, in an action against the indorser of a promissory note, on the trial of which is adduced proof of demand and notice to the defendant, where the allegation of due notice is controverted by him. *Union Bank v. Stone*, 631.
10. EVIDENCE IN SUPPORT OF CHARACTER OF EITHER PARTY IS INADMISSIBLE, as a general rule, until there has been an attempt by evidence to impeach it. *Miles v. Vanhorn*, 477.
11. TREATY IS PUBLIC LAW OF WHICH JUDICIAL NOTICE WILL BE TAKEN BY COURTS. *Godfrey v. Godfrey*, 448.
12. COURTS JUDICIALLY KNOW WHEN RAILROAD LAW WENT INTO EFFECT. *Heaton v. Cincinnati etc. R. R. Co.*, 430.
13. GENERAL OBJECTION TO EVIDENCE is properly overruled if any part of it is admissible. *Morrison v. Whiteside*, 661.
14. DEMAND FOR PRODUCTION OF ORIGINAL ENTRY OR PAPER may be made at any time before the trial is concluded by the party desiring it. A refusal to produce it gives the demandant the right to prove the contents of the document by secondary evidence. If, however, the document demanded is shown to be in a place so remote from that of the trial that it cannot be produced at the trial between the time the demand is made and the conclusion of the evidence, such notice will not be deemed sufficient to authorize the introduction of secondary evidence. *Id.*
15. PRODUCTION OF PAPERS UPON NOTICE does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents, in which case the rule is that they are admitted as evidence for both parties. *Id.*

FRAUDULENT CONVEYANCES.

1. MORTGAGE TO SECURE PRE-EXISTING DEBT IS NOT LESS VOID AS TO CREDITORS because a mortgage to secure the same debt, executed at the time the debt was contracted, contained a covenant that a new mortgage should be given at a certain future time as additional security for the debt. *Simpson v. Carleton*, 707.
2. EVIDENCE SHOWING DEBTOR'S INATTENTION TO BUSINESS AND INDULGENCE IN EXPENSIVE HABITS, and that these facts were known to an alleged fraudulent mortgagee, and evidence of the debtor's general reputation as to insolvency, is admissible in a suit by the assignee in insolvency, against the mortgagee, to recover the value of property taken under the mortgage, to show that the mortgagee had reasonable cause to believe the debtor insolvent. *Id.*
3. GRANTOR OF DEED, FRAUDULENT AS TO CREDITORS, is a necessary party in a suit to vacate such deed. *Lovejoy v. Irelan*, 667.

See DEBTOR AND CREDITOR.

FRAUDULENT PREFERENCES.

See DEBTOR AND CREDITOR.

GARNISHMENT.

See ATTACHMENTS.

GAS COMPANIES.

1. GAS COMPANY MAY REFUSE AT PLEASURE TO SUPPLY GAS TO CONSUMER, in the absence of any contract or special provision in the charter. Maker of gas is subjected to no greater duties and liabilities than the manufacturers and vendors of other commodities. *McCune v. Norwich City Gas Co.*, 278.
2. DECLARATION IN ACTION AGAINST GAS COMPANY FOR CUTTING OFF PLAINTIFF'S GAS SUPPLY, alleging that the gas-pipes of the plaintiff and defendant were united, and up to a specified time defendants had supplied plaintiff with gas by means of such pipes and had been paid for it, and that plaintiff desired to take defendants' gas, and was ready and willing to pay for it as before, and that it was the duty of the defendants to supply plaintiff with gas, but that they maliciously shut off the gas and refused to supply him—states no title or right of recovery, and is not cured by verdict; and after verdict, judgment will be arrested on the ground of the insufficiency of the declaration. Had the plaintiff declared upon a contract to supply him with gas until reasonable notice given of an intention to discontinue, the jury might perhaps have found such contract and its violation; but the mere allegation of duty is of no avail. *Id.*

GIFTS.

1. GIFT OF PERSONALTY, AT COMMON LAW, CAN ONLY BE CONSUMMATED BY DEED, or other instrument under seal, in the absence of an actual delivery of the thing itself. *Connor v. Trawick's Adm'r*, 58.
2. DELIVERY OF DEED CONSUMMATES GIFT ON PRINCIPLE OF ESTOPPEL, and not because the delivery of the deed is a symbolical delivery of the property. *Id.*

2. REMAINDER IN PERSONALTY CREATED BY ORAL GIFT is inoperative and void. *Ragdale v. Norwood*, 79.

See HUSBAND AND WIFE, 6.

GROWING CROPS.

GROWING CROPS ARE NOT "GOODS AND CHATTELS," within the meaning of the section of the statute of frauds which requires immediate delivery, and actual and continued change of possession of goods and chattels, to render a sale valid as against creditors, as they are not susceptible of manual delivery until harvested and reduced to actual possession, and hence they pass by deed or conveyance. The fact, therefore, that after a sale the vendor continues to live on the premises will not render the sale void as against creditors. *Bernal v. Hovious*, 147.

See ATTACHMENTS, 5.

GUARDIAN AND WARD.

See INFANCY, 4-6.

HABEAS CORPUS.

1. LEGALITY OF IMPRISONMENT RESULTING FROM DISOBEDIENCE OF ORDERS, merely erroneous or irregular, cannot be inquired into under the writ of *habeas corpus*. *Ex parte Grace*, 529.
2. NO COURT OR JUDGE CAN, UPON HABEAS CORPUS, REVIEW JUDGMENT of court of competent jurisdiction finding a creditor guilty of fraud in not surrendering his property for the payment of his debts. *Id.*

HIGH-WATER MARK.

See BOUNDARIES.

HIGHWAYS.

1. EASEMENT FOR PUBLIC IN STREET DEDICATED TO CITY IS REAL FRANCHISE holden by the corporation for the benefit of all the citizens. *City of Apalachicola v. Apalachicola Land Co.*, 284.
2. CITY WHICH CONSTRUCTS HIGHWAY IN DIFFERENT MANNER FROM THAT AUTHORIZED IS LIABLE FOR INJURIES caused by careless construction, as much as though it had built the highway in the mode prescribed. *City of Pekin v. Newell*, 378.
3. CITY IS NOT LIABLE FOR INJURY HAPPENING TO TRAVELER while straying outside of an unfenced highway, when the whole highway, and the land adjoining it, are safe and convenient to travel upon. *Sparhawk v. City of Salem*, 700.
4. CITY IS NOT BOUND TO FENCE HIGHWAY MERELY TO PREVENT TRAVELERS from straying out of highway, when there is no unsafe place immediately contiguous to the way. *Id.*
5. DAMAGES RESULTING FROM GRADING OF STREETS AND HIGHWAYS, so far as they consist simply in rendering the passage to and from adjoining property more inconvenient and expensive, constitute a loss for which there is no redress. *Wabash and Erie Canal v. Spears*, 444.
6. CITY HAVING POWER TO ERECT WHARF MAY IMPOSE TOLL FOR USE THEREOF. *City of Apalachicola v. Apalachicola Land Co.*, 284.

7. ONE MAY USE HIS OWN LAND AS HE PLEASES, so long as he is reasonably careful that such use shall not injure third persons. This doctrine is applied to the use of streets by cities, and highways by the state and counties, through their officers, and is to some extent applicable to private corporations. *Wabash and Erie Canal v. Spears*, 444.
8. RAILROAD COMPANY HAS NO RIGHT TO USE HIGHWAY AS PART OF FREIGHT-YARD, but it may pass and repass upon the highway for any lawful purpose, provided it uses it only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Gahagan v. Boston etc. R. R. Co.*, 724.

See DEDICATION, 4; NEGLIGENCE, 5.

HOMESTEADS.

1. HOMESTEAD ACT IS REMEDIAL IN ITS NATURE, and must be so construed as most effectually to meet the benevolent end in view in its enactment, without, however, departing from the plain and obvious meaning of its language. *Deere v. Chapman*, 350.
2. HOMESTEAD ACT PROTECTS OWNER OF LOT AND BUILDING THEREON OCCUPIED BY HIM as a home, although the estate therein owned by him be less than an estate in fee. *Id.*

HUSBAND AND WIFE.

1. CONTRACT BY HUSBAND, MADE BEFORE MARRIAGE, or afterwards when living in amity with his wife, to pay an allowance for her support, if at a future time she should separate from him, is against public policy, and void. *Gaines v. Poor*, 559.
2. HUSBAND'S CONTRACT TO SUPPORT WIFE IS VALID, if made in contemplation of the continuance of a previous separation, or of an immediate separation, where disagreements have taken place between husband and wife. *Id.*
3. TO CREATION OF SEPARATE USE, no particular form of words is necessary. Therefore, though the usual technical words to create a separate use are not employed in a contract, yet when it shows that a separation was intended between husband and wife, and that the property was conveyed to a trustee, in trust for her, in view of such separation, it is clear that a separate use is intended, and the trustee will hold the property for the separate use of the wife. *Id.*
4. IT IS NOT ESSENTIAL TO VALIDITY OF CONTRACT BY HUSBAND for the future support of his wife, disagreements having arisen between them, that separation should take place before the execution of the contract; and the testimony of the wife is inadmissible to prove that they had not separated at the time of its execution, or that the conduct of the husband toward her was threatening and violent, in order to procure the execution of such contract. *Id.*
5. WIFE'S RIGHT TO ALIMONY AND DOWER IS NOT BARRED by a contract entered into by her husband with another, but to which she is not a party, and by which it is agreed, the husband and wife having separated, that the obligor will save the husband, his heirs or representatives, free from any claim of the wife to maintenance, alimony, or dower, in consideration of the conveyance to him of certain property in trust for the use and benefit of the wife. *Id.*

6. **MARRIED WOMAN MAY BECOME SEIZED OF LAND BY DIRECT GIFT OR PURCHASE** in her own name and as her own property in Maryland, but in such property her husband retains his marital rights, viz., a life estate, in right of his wife, with a right to the pernaney of the products and profits of the land during coverture, and a right to the land by curtesy in the event of his surviving his wife. *Mutual Fire Ins. Co v. Deale*, 673.
7. **WIFE'S POSSESSION OF PERSONALTY, AT COMMON LAW, IS POSSESSION OF HUSBAND**, and cannot become antagonistic to his rights. This is so, although it be shown that the husband abandoned the wife when her possession began, and lived in adultery with another woman, and never asserted any claim to the property, and that she held and claimed it as her own individual property, for a continuous period of more than twenty years. *Bell v. Bell's Adm'r*, 73.
8. **HUSBAND AND WIFE CANNOT RECOVER JOINTLY IN ACTION BY THEM EX CONTRACTU** for the breach of a contract made, during the wife's coverture, with a steamship, for the transportation of the wife from San Francisco to New York. But if, in such action, no demurrer be interposed, and if the facts stated and proved show that plaintiffs are entitled to relief for fraud practiced by defendant, or for personal injury to the wife, then the action to that extent is well brought, and relief will not be denied on the ground that the same facts would support an action on the contract, in which the husband alone can recover. *Sheldon v. Steamship Uncle Sam*, 193.
9. **HUSBAND AND WIFE MUST JOIN IN ACTION FOR INJURY** done to the person of the latter; and it is immaterial that the injury is charged to have been committed in violation of a contract. *Id.*
10. **TWO ACTIONS WILL LIE, AS GENERAL RULE, FOR TORT COMMITTED UPON WIFE**: 1. By the husband alone, for the loss of service, expenses, etc.; 2. By the husband and wife for the injury to the wife's person. *Rogers v. Smith*, 483.
11. **IT IS NOT NECESSARY THAT ONE FURNISHING NECESSARIES TO WIFE** should know of the circumstances of the wife's separation from her husband at the time of their occurrence; but it is sufficient if at the time he supplies the necessities he has information of those circumstances, and they justify a furnishing of necessities on the credit of the husband. *Cartwright v. Bate*, 759.
12. **HUSBAND SUE FOR NECESSARIES FURNISHED WIFE, WHOM HE HAS EXPELLED FROM HOME**, is estopped from setting up in defense her subsequent marriage and conviction of bigamy therefor, if he intentionally misled her into a belief of his death and of her right to marry again. *Id.*
13. **HUSBAND NOT BOUND TO PAY WIFE'S LEGACIES WHERE SHE LEAVES NO PROPERTY**.—If wife dies testate, but leaves no property out of which the legacies bequeathed by her can be satisfied, the husband is under no obligation to pay them, and his promise to do so is not binding upon him, because the wife had no property of her own. *Schnell v. Nell*, 453.

See CONTRACTS, 3; INSURANCE, 2; SHIPPING, 1-3; SLAVERY, 3.

INFANCY.

1. **IF INFANT FORMS PARTNERSHIP** with an adult, he holds himself forth to the world as not being an infant. He practices a fraud on the world. *Kemp v. Cook*, 681.

2. JUDGMENT AGAINST INFANT IS NOT VOID; it is only voidable. Courts will sustain the acts of an infant and bind him, unless the acts are clearly prejudicial to the infant. *Id.*
3. IN PROCEEDING TO SELL INFANT'S LANDS under Kentucky statute, commissioner's report must show that the property therein valued is all the real and personal estate belonging to the infant whose land is sought to be sold. Without such report, the sale is void. *Mattingly v. Read*, 535.
4. SALE OF INFANT'S LAND BY GUARDIAN IS VOID for non-conformance to requirements of law, where the order appointing commissioners directs them to report whether or not such sale would redound to the infant's interest, and they reporting, say that, "in their opinion, a sale of the land and slaves, and a division of the proceeds, would redound to the interest and benefit of such infant;" the law requiring that the guardian "allege his belief that the sale will redound to the benefit of the infant;" and that, before the court shall have jurisdiction to order such sale, the commissioners shall report, under oath, "whether the interest of the infant requires the sale to be made." *Id.*
5. UNTIL APPLICATION BY STATUTORY GUARDIAN for sale of infant's lands, the court has no right to appoint commissioners to value the ward's estate. *Id.*
6. GUARDIAN AD LITEM APPOINTED TO REPRESENT INFANT IN SUIT FOR PARTITION has power to defend for the infant solely against the claim set up for partition of the common estate. The appointment of such guardian is a special power exercised by the court, and gives only a special and limited authority to the guardian, and his acts, so far as they transcend this authority, are void. The guardian has no power to admit away the rights of the infant, nor can the court give effect to any such admission as to a matter and for a purpose not within the scope of the appointment or the purview of the complaint in the suit. *Waterman v. Lawrence*, 212.

See PARENT AND CHILD; PARTITION, 10.

INJUNCTIONS.

1. ON APPLICATION FOR INJUNCTION, CHANCELLOR MAY GO INTO CONSIDERATION OF MERITS as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges. *City of Apalachicola v. Apalachicola Land Co.*, 284.
2. ON MOTION FOR INJUNCTION, COURT WILL NOT COMMIT ITSELF to points or questions that may arise at the final hearing. *Id.*
3. TO JUSTIFY ARREST, BY INJUNCTION, OF EXECUTION OF DECREE OF CHANCERY establishing certain claims, it must be shown that the applicant has a prior right which he has not lost by laches. *Id.*

See CONTEMPTS, 4.

IMPRISONMENT.

See CONSTITUTIONAL LAW, 14.

INSANITY.

1. ADULT PERSON OF UNSOUND MIND IS LIABLE ON IMPLIED CONTRACT FOR NECESSARIES furnished him, suitable to his estate and condition in life. *Ex parte Northington*, 67.

2. ACTION FOR PRICE OF SUITABLE NECESSARIES FURNISHED TO ADULT PERSON OF UNSOUND MIND must be prosecuted against him personally, where no guardian has been appointed for him. *Id.*
3. ADULT PERSON OF NON-SANE MIND, WHEN SUED, MUST BE DEFENDED BY ATTORNEY, to be appointed by the court, if necessary; and if the court refuses to allow the plaintiff to proceed, "unless he first have a guardian appointed by the probate court, and notify such guardian of the pendency of the suit," the supreme court will award a *mandamus*, at plaintiff's instance, to compel the appointment of an attorney for the defendant. *Id.*

INSOLVENCY.

1. CERTIFIED COPIES OF SCHEDULE OF DEBTS AND LIST OF CLAIMS filed in insolvency proceedings are incompetent to show that debtor was insolvent at the time he made an alleged preference. *Simpson v. Carleton*, 707.
2. DISCHARGE UNDER INSOLVENT LAWS OF MASSACHUSETTS IS NO BAR to an action upon a promissory note given in such commonwealth, payable at no particular place, but indorsed to a citizen of another state before the commencement of the proceedings in insolvency, although not indorsed until after it became due. *Fessenden v. Willey*, 762.
3. LEGISLATURE HAS NO POWER TO VALIDATE OR CONFIRM INSOLVENCY PROCEEDINGS which were commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, and which have been adjudged invalid by a decree of the highest court of the state. *Denny v. Mattoon*, 784.

See CONVERSION; MORTGAGES, 26.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 25-27.

INSURANCE.

1. IF INSURANCE AGENT FILLS UP APPLICATION of an applicant for insurance to the company for which the agent is soliciting insurance, and is also a stockholder in such company, the agent becomes thereby the agent of the person seeking to be insured, for that purpose, and is a competent witness on behalf of the company to prove what happened between the agent and applicant at that time. *Mutual Fire Ins. Co. v. Deale*, 673.
2. HUSBAND HAS INSURABLE INTEREST in his wife's property under the laws of Maryland. *Id.*
3. INSURANCE MADE BY INSURANCE COMPANY at its own risk, on a husband's interest in his wife's property, in Maryland, would be covered by describing the property as his; and his omission to state the nature and extent of his interest, where no inquiry was made, would not avoid the policy. *Id.*
4. IN INSURANCE MADE BY MUTUAL INSURANCE COMPANY, the title of the assured to the property insured becomes an important consideration of the contract, when that instrument declares that the premium notes shall be a lien upon the real property insured, and a material misrepresentation or concealment in relation to it will avoid the policy. *Id.*
5. ASSURED WHO DESCRIBES INSURED PROPERTY as "my house" does not thereby warrant his title to the realty to be an unincumbered fee-simple title. *Id.*

6. **WHETHER MISREPRESENTATION OR CONCEALMENT** will avoid the policy depends upon its materiality to the risk undertaken; and the policy would attach, unless the insurer had been induced to make it by reason of such concealment or misrepresentation of material facts with respect to the title, which, if known to the company, would have influenced it in making the contract. *Id.*
7. **QUESTION OF MATERIALITY OF MISREPRESENTATION OR CONCEALMENT** of facts is a question for the jury to decide. *Id.*
8. **INSURANCE COMPANY IS NOT BOUND BY STATE OF RECORDS CONCERNING TITLE** to the property insured, but may rely upon the representations of the assured with reference thereto. *Id.*
9. **POLICY WILL BE AVOIDED FOR FAILURE TO MENTION IN APPLICATION SEVERAL BUILDINGS** within one hundred feet of insured property, in reply to a question, "What is the distance and direction of said building from other buildings within one hundred feet, and how are such other buildings constructed and occupied?" although a jury decides that these omitted buildings were not material to the risk, where the application and by-laws of the company are made a part of the policy, and the by-laws provide that the application shall be held to be a warranty by the assured, and that "unless the applicant for insurance shall make a correct description of and statement of all facts required or inquired for in the application, and also all other facts material in reference to the insurance or to the risk or to the value of the property, the policy issued thereon shall be void;" and the application contains a covenant at the end that "the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance." *Tebbetts v. Hamilton Mutual Ins. Co.*, 740.
10. **WHERE, TAKING WHOLE INSTRUMENT TOGETHER, IT IS OBVIOUS THAT INSURANCE COMPANY** have made the strict and literal exactness of the answers to certain questions a condition of the contract of insurance and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured, for they have a legal right to say that they will determine for themselves what is or is not material to the risk, and will base their contract upon the answers of the insured to specific interrogatories. *Id.*
11. **COVENANT IN APPLICATION FOR INSURANCE** that "applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance," is a warranty on the part of the insured that all the facts inquired into are correctly given, whether material or not, and all other facts material to the risk are correctly given even if not inquired into. Nor can a provision that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss" qualify the previous covenant, because it can have its full effect consistently with it. *Id.*
12. **MISTAKES IN STATING INSURABLE INTEREST IN POLICY OF INSURANCE MAY BE CORRECTED** upon averment of intention and mistake, when issue is joined thereon. Thus where the actual interest of one in premises insured is a mechanic's lien, but such interest was described in the policy as that of a mortgagee, which description was declared to be and was believed to be sufficient to embrace a mechanic's lien, the insured may show the mistake as one of fact, by evidence admissible in a proper chan-

cary proceeding, and recover on the instrument as corrected. *Stout v. City Fire Ins. Co.*, 539.

12. POLICY OF INSURANCE IS ADMISSIBLE TO PROVE MISTAKE THEREIN AND INTENTION OF PARTIES, where issue has been joined upon an averment of intention and mistake, and where the parties have stipulated that any evidence may be introduced to correct it which would be received in a proper chancery proceeding. *Id.*
14. MECHANIC'S LIEN ON PROPERTY CONSTITUTES INSURABLE INTEREST THEREIN. *Id.*
15. ASSIGNMENT OF POLICY OF INSURANCE MAY BE MADE WITH CONSENT OF INSURER, and such assignment will pass with it everything necessary to carry the purpose of the assignment into effect, though an actual assignment of the original indebtedness is not made. *Id.*
16. WARRANTIES IN POLICIES OF INSURANCE ARE AFFIRMATIVE or express, and promissory or executory. There may be several warranties, and of each class, in one policy. Stipulations in policies are considered express warranties. *Id.*
17. EXPRESS WARRANTY IS AGREEMENT EXPRESSED IN POLICY whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done. It is not requisite that the circumstances or act warranted should be material to the risk. *Id.*
18. EXAMPLE OF POLICY CONTAINING BOTH AFFIRMATIVE AND EXECUTORY WARRANTIES.—Where policy recites in description of building insured that it is "occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy," the recital as to the occupancy of the lower story is an affirmative or express warranty, which, if false at the time the policy was issued, will operate to avoid it, whether material to the risk or not; but it is not a continuous warranty. The stipulation, however, in regard to the upper story of the building is a promissory or executory warranty, a non-compliance with which, at any time during the existence of the policy, will operate to avoid it, whether material to the risk or not. *Id.*
19. PARTIES TO POLICY OF INSURANCE MAY FIX TIME WITHIN WHICH SUIT MUST BE COMMENCED, and it will, in the absence of qualifying circumstances, be valid and binding upon them. But where the interest insured was a mechanic's lien, and the insured or his assignee was required to make proof to the insurer of the value of the interest insured, which proof could not be made in a legitimate manner within the time stipulated, the stipulation was held to be inoperative. *Id.*
20. POLICY OF INSURANCE IS NOT AVOIDED ON GROUND OF VIOLATION OF BY-LAW of company requiring the true title of the insured in the property to be expressed in the application for insurance, where the insured is a mortgagee in possession, and the application is for insurance "on dwelling-house," and states, in reply to a question as to incumbrances: "First mortgage to M. W. [the name of the applicant], entered October, 1855;" and in reply to a question whether the property is insured, states: "Not on first mortgagee's interest," and the application contains no direct question as to the title of the applicant; for there is no misstatement of the applicant's interest, and it is the duty of the company to require fuller statements in this regard, if the answers given are not sufficiently full. *Wyman v. People's Equity Ins. Co.*, 737.

21. NOTICE TO INSURANCE COMPANY CLAIMING TOTAL LOSS OF WOODEN BUILDING, which was wholly consumed, with the exception of bricks of walls and chimneys and stone-work of the building, is a sufficient statement of the loss, though the by-laws of the company require a statement of the value of such parts as remain; especially when the amount insured was much less than the value of the building, and the value of the brick and stone was very small. *Id.*
22. MORTGAGE IS MATERIAL ALTERATION IN OWNERSHIP OF PROPERTY INSURED, and if not consented to as provided in the by-laws of the insurance company, will avoid a policy issued "under the conditions and limitations expressed in the by-laws," which provide that "all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within thirty days. *Edmonds v. Mutual Safety Fire Ins. Co.*, 746.
23. INSURED IS BOUND TO DISCLOSE CHANGE MADE IN INSURED PROPERTY after issuance of policy, whether material or not, if he would have been bound to disclose such a condition of the property, in answer to the interrogatories, had it existed at the time of making the application for the insurance, where the by-laws of the company, which are made a part of the policy, provide that if subsequent to the making of the application any new fact shall exist by a change of any fact disclosed in the application, or the erection or alteration of any building which increases the risk, or which it would have been necessary to state had it existed at the time the application was made, the policy shall be void, unless written notice thereof shall be given the directors, and their written consent obtained. *Calvert v. Hamilton Mut. Ins. Co.*, 744.
24. FAILURE TO GIVE NOTICE AND MAKE PROOF OF LOSS FOR SEVENTEEN MONTHS will prevent recovery upon policy of insurance, where the application for insurance contained a stipulation that the assured would be bound by the by-laws of the company, and the policy recites that the company will indemnify the assured according to the true intent and meaning of the by-laws, and refers to the application as binding upon the assured under the limitations and conditions expressed in the by-laws; and the by-laws provide that the assured shall, within thirty days after loss by fire, file with the secretary a particular account of the amount of his loss, etc., and that unless such proofs are produced within thirty days, the losses shall not be payable. *Smith v. Haverhill Mut. Fire Ins. Co.*, 733.
25. FAILURE TO GIVE NOTICE AND MAKE PROOF OF LOSS WITHIN THIRTY DAYS, as required by by-laws of mutual insurance company, is not waived by a remark of the president, made seventeen months after the loss, that the company would be disposed to do what was right, and that they knew at the time of the fire that it was their loss, and were surprised that they were not notified; or by a subsequent direction of the board of directors, that the assured should send them a statement of the loss, and they would take the subject into consideration, or by a subsequent vote of directors that the assured be required to make a statement, under oath, in regard to the loss. *Id.*
26. KNOWLEDGE OF FIRE BY AGENT OF MUTUAL INSURANCE COMPANY does not relieve the assured from the obligation of giving notice and making proof of loss, pursuant to the by-laws of the company. *Id.*

27. **STRONG EVIDENCE OF WAIVER OF PROVISIONS OF BY-LAWS OF INSURANCE COMPANY** requiring notice and proof of loss to be made within a specified time is necessary, when a long time has elapsed between the fire and notice of the loss. *Id.*
28. **PRESIDENT OF MUTUAL INSURANCE COMPANY HAS NO AUTHORITY TO WAIVE BY-LAW** that no policy shall be delivered until after the premium is paid, and a vote of the directors that if premiums are not paid within sixty days from the date of policies the policies shall be considered as canceled; and the company is not bound by the representations of the president to a mortgagee that the mortgagor had procured insurance upon the mortgaged property payable to the mortgagee, when in fact the policy had not been delivered because of the failure of the mortgagor to pay the premium. *Baxter v. Chelsea Mutual Fire Ins. Co.*, 730.
29. **MUTUAL INSURANCE COMPANIES DIFFER ESSENTIALLY FROM STOCK INSURANCE COMPANIES.** They need many by-laws and conditions that are not required in stock companies, and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. *Id.*
30. **DIRECTORS OF INSURANCE COMPANY ARE LIABLE PERSONALLY TO ASSURED** who, by reason of the insolvency of the company, has been unable to recover upon his policy, where they have fraudulently made and published false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein; and it is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff. *Salmon v. Richardson*, 255.
31. **EVIDENCE IS RELEVANT AND ADMISSIBLE IN ACTION AGAINST DIRECTORS OF INSURANCE COMPANY** for making false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein, and where one of the defendants denies all participation in the fraud, and all knowledge that bonds belonging to him were ever represented to be the property of the company, when the evidence tends to show that the president and another director had shortly before the publication of the false and fraudulent reports solicited such defendant to make an arrangement by which such bonds might be represented to be the property of the company, when offered in connection with other evidence tending to show that such an arrangement was consummated. So also a receipt given by such defendant to the company, and acknowledging that the bonds were the property of the company, and were held by him subject to his order, was admissible. And acts of such defendant, though done after the issuance of the policy to the plaintiff, are admissible, where they tend to show the defendant's knowledge of and participation in the fraud. *Id.*
32. **ASSUMPSIT IS PROPER REMEDY** on a contract, not under seal, indorsed on a policy of insurance for additional insurance. *Mutual Fire Ins. Co. v. Deale*, 673.
33. **AGENT WHO NEGLECTS TO INSURE CARGO SHIPPED TO HIM**, as directed by the owner, cannot maintain an action for a premium of insurance, although he would have been liable to the owner in damages for neglect of duty, in case the cargo had been lost. *Storer v. Eaton*, 611.

INTEREST.

See EMINENT DOMAIN, 4; USURY.

INTERROGATORIES

See ATTACHMENTS, 21.

INTERVENTION.

See ATTACHMENTS, 21.

INTOXICATION.

See CRIMINAL LAW, 6, 7.

JUDGMENTS.

1. JUDGMENT RECORDS ARE HIGHEST EVIDENCES of the facts determined in such judgment, and it would be contrary to sound public policy and law to permit them to be set aside, altered, or varied without the most solemn forms of proceeding. *Kemp v. Cook*, 681.
2. IF PARTY HAS KNOWINGLY ACQUIESCED IN JUDGMENT complained of, or has been guilty of laches or unreasonable delay in seeking his remedy, relief will not be granted. *Id.*
3. JUDGMENT BY DEFAULT IS MERE ADMISSION OF CAUSE OF ACTION, leaving the rights of the parties to be determined upon defendant's motion to be heard in damages. *Welch v. Wadsworth*, 236.
4. ACTION UPON JUDGMENT IS NOT BARRED BY FACT that the judgment has been removed by writ of error to a superior court. *Nill v. Compere*, 411.
5. EQUITY WILL NOT RESTRAIN JUDGMENT BECAUSE OF IRREGULARITY in not having a writ of inquiry as provided by statute, prior to entry of judgment for condemnation by default against a corporation garnishee. *Boyd v. Chesapeake etc. Canal Co.*, 646.
6. JUDGMENT RECOVERED BEFORE INFERIOR COURT MAY BE PROVED BY memoranda of the magistrate upon his docket, and by the production of the original papers in the case, verified by the testimony of the magistrate, if these, when taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. *McGrath v. Seagrave*, 797.
7. DOMESTIC JUDGMENT RENDERED BY COURT OF GENERAL JURISDICTION cannot be collaterally attacked, where no want of jurisdiction is apparent on the record, for in such case jurisdiction is conclusively presumed. *Coit v. Haven*, 244.
8. JUDGMENT MAY BE COLLATERALLY ATTACKED ON GROUND OF WANT OF JURISDICTION, if it be a foreign judgment, or a judgment of a court of limited jurisdiction, or the want of jurisdiction is apparent on the record; for then the jurisdiction is either not presumed, or the presumption is repelled by the record itself; and the judgment is a nullity if the want of jurisdiction in fact exists. *Id.*
9. JURISDICTIONAL FACTS, SUCH AS SERVICE OF WRIT, ARE CONCLUSIVELY PRESUMED in case of a judgment of a domestic court of general jurisdiction, unless the record itself shows the contrary. *Id.*
10. REASON THAT JURISDICTIONAL FACTS ARE NOT CONCLUSIVELY PRESUMED IN CASE OF FOREIGN JUDGMENTS of courts of general jurisdiction is, that one cannot reach a foreign judgment for the purpose of reversal, without going to the foreign jurisdiction. *Id.*
11. REMEDY OF ONE INJURIOUSLY AFFECTED BY RULE OF CONCLUSIVE PRESUMPTION OF JURISDICTIONAL FACTS is a writ of error for reversal, or a

motion for a new trial; or, if the danger is imminent and special, he may obtain the aid of equity. *Id.*

12. WRIT OF ERROR CORAM NOBIS LIES to correct an error in fact in the same court where the record is. *Kemp v. Cook*, 681.
 13. POWER OF SETTING ASIDE JUDGMENTS on motion is a common-law power of courts of record, but it was rarely exercised after the lapse of the term in which the judgment was rendered. *Id.*
 14. PARTY TO JUDGMENT CANNOT BE PERMITTED IN EQUITY ANY MORE THAN AT LAW COLLATERALLY TO IMPEACH IT on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. *Boston and Worcester Railroad Corporation v. Sparhawk and Wife*, 750.
 15. AFFIDAVIT IS INSUFFICIENT TO AUTHORIZE VACATION OF JUDGMENT rendered upon actual notice in law, if it fails to show any meritorious defense, or any excuse for not making an application to set aside the judgment at the same term at which it was rendered. This applies to an application to set aside a judgment, rendered at a former term, on the ground, simply, that the defendant was absent from the state, when process was served and had no actual notice of the pendency of the suit until after judgment. *Sturges v. Fay*, 440.
 16. WHERE CREDITOR ATTACKS JUDGMENT BY CONFESSION AS BEING FRAUDULENT as to him on the ground that the object of the debtor and of the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to have the judgment enforced, he must plead this ground. A general averment in the complaint that the intent was to hinder, delay, and defraud is insufficient, and will not put the adverse party on his defense. *Meeker v. Harris*, 215.
- See ATTACHMENTS, 4; INFANCY, 2; INSOLVENCY, 2; LIT PENDENS; MECHANICS' LIENS, 19; PARTITION, 1, 9, 10; PLEADING AND PRACTICE, 36, 38; REPLEVIN, 5.

JURISDICTION.

1. STATE HAS JURISDICTION OVER ALL PERSONS AND ALL PRIVATE PROPERTY WITHIN HER BORDERS, and may subject both the one and the other to her judicial power; but she cannot thus subject either persons or property not within her jurisdiction. *Sturges v. Fay*, 440.
2. STATE EXERCISES HER JURISDICTION OVER PROPERTY BY SEIZING IT through the officers of her courts. *Id.*
3. STATE EXERCISES HER JURISDICTION OVER PERSONS BY BRINGING THEM BEFORE HER COURTS, by the action of her officers, or by notifying them to voluntarily appear. This notice she has absolute power to give to persons within her boundaries, but not to persons outside of her borders. Against the former class only has she power to render a personal judgment. *Id.*
4. CIRCUIT COURT OF INDIANA IS ONE OF GENERAL AND UNLIMITED JURISDICTION; hence its authority to proceed in the trial of a cause need not affirmatively appear in the complaint. *Godfrey v. Godfrey*, 448.
5. OBJECTION FOR WANT OF JURISDICTION, IF IT EXISTS, MAY BE RAISED BY ANSWER, or at any subsequent stage of the proceedings. *Id.*

See JUDGMENTS, 7-11; PARTITION, 3.

JURY AND JURORS.

1. WHERE JUROR STATES OF HIS VOIR DIRE THAT HE HAS FIXED OPINION as to the guilt of the accused, he is incompetent to try a criminal case,

- even though the opinion was formed from hearsay evidence. *Madden v. State*, 307.
2. ONLY STATUTORY QUESTIONS respecting his competency should be propounded to a juror in a criminal case. *Monday v. State*, 314.
 3. JUROR IS INCOMPETENT TO TRY CASE INVOLVING CAPITAL PUNISHMENT if he has conscientious scruples against the infliction of the death penalty. *Id.*
 4. SUSTAINING CHALLENGE TO JUROR FOR CAUSE not rendering him legally incompetent, where the act was done in an effort to get an impartial jury, and such result was achieved, is not error for which judgment will be reversed. *Heaton v. Cincinnati etc. R. R. Co.*, 430.
- See AGENCY, 3; CONTEMPTS, 1-3; EVIDENCE, 8, 9, 16-18; PLEADING AND PRACTICE, 25, 27, 30.

LANDLORD AND TENANT.

1. ALIENATION OF ESTATE BY LANDLORD CHANGES TENANCY AT WILL TO TENANCY AT SUFFERANCE. *Eddy v. Baker*, 616.
2. STATUTE PROVIDING FOR TERMINATION OF TENANCY AT WILL BY NOTICE in writing served upon the occupant thirty days before the time fixed in said notice for the termination thereof, does not provide that such tenancies cannot be terminated in any other way; tenancies at will at common law may be terminated in the same manner as before the statute. *Id.*
3. TENANT AT SUFFERANCE CANNOT MAINTAIN TRESPASS *quare clausum fregit* for a peaceable entry. *Id.*
4. ESTATE FOR YEARS BECOMES MERGED IN FEE when the fee is acquired by the tenant for years. The lease becomes extinct, and no person can thereafter claim under it. *Carroll v. Ballance*, 354.
5. ADMINISTRATOR OF LESSEE WILL BE HELD TO HAVE ENTERED AND TAKEN POSSESSION OF PREMISES, and will be personally liable to the lessor for the rent thereof, until his estate therein is terminated by a notice to quit, to the extent of the real value of the premises, where he fails to quit and surrender the demised premises immediately after his appointment, or upon notice to quit, until a judgment for the possession thereof has been obtained against him; but, instead, keeps the property of his intestate there for several weeks, sells it by auction upon the premises, and claims of an under-tenant of part of the premises rent which accrued after his intestate's death. *Inches v. Dickinson*, 765.
6. AGREEMENT IS NOT LEASE, BUT CONTRACT TO WORK ON SHARES, and the parties are tenants in common until a division be made, where the terms of the agreement, which was entered into verbally between the owner of land and another, are that the latter is to have the land for three years, and to work it, and is to give to the owner therefor one third of the grain raised, after it is put in sacks, free from the expense of thrashing, the owner to furnish farming implements, wagons and horses, and his share of sacks. *Bernal v. Hovious*, 147.

See NUISANCE, 1, 2.

LARCENY.

See CRIMINAL LAW, 5, 6.

LICENSE.

SALE OF TICKET OF ADMISSION TO CONCERT IS MERE REVOCABLE LICENSE to enter hall and remain during the concert, and if revoked after the en-

france of the purchaser, and he refuses to depart upon request, he becomes a trespasser, and may be removed by such force as is necessary to overcome his resistance; and for such removal trespass will not lie, his only remedy being an action for the breach of contract. *Burton v. Scherpf*, 717.

LIENS.

See ATTACHMENTS, 8, 9, 11, 14; ATTORNEY AND CLIENT, 6-9; COMMON CARRIERS, 11, 12; MECHANICS' LIENS; VENDOR AND VENDEE, 7-10.

LIS PENDENS.

PENDING OF ACTION IN ONE STATE BETWEEN SAME PARTIES FOR SAME CAUSE, at the time when an action is commenced in a court of another state, cannot invalidate the judgment of the latter court, where it had jurisdiction of the parties and of the subject-matter, and the fact that another action was pending was in no manner made known to it. And such judgment will bar a recovery in such prior pending suit. *North Bank v. Brown*, 609.

LOST PROPERTY.

See ABANDONMENT.

MARKETS.

See DEDICATION, 4, 5.

MARRIED WOMEN.

See DOWER; EXECUTORS AND ADMINISTRATORS, 3; HUSBAND AND WIFE.

MASTER AND SERVANT.

WHERE CONTRACT FOR SERVICE IS MADE FOR FIXED PERIOD, and the employer without good cause discharges the servant before its termination, he is still liable, and the servant may recover the stipulated wages. *Webster v. Wade*, 218.

MECHANICS' LIENS.

1. MATERIAL-MEN NEED NOT ALSO BE CONTRACTORS OR SUBCONTRACTORS in order to have a lien upon a building, for materials furnished for its erection or repair, under the Connecticut statutes. An earlier statute, confining the lien to contractors and subcontractors, is superseded by later statutes extending the lien to material-men. *Chapin v. Perce and Brooks Paper Works*, 263.
2. MERE GENERAL SALE OF BUILDING MATERIALS DOES NOT CREATE LIEN upon buildings upon which they afterwards happen to be used. *Id.*
3. LIEN DOES NOT ATTACH TO BUILDING FOR WHICH MATERIALS ARE EXPRESSLY FURNISHED, if they do not, in fact, go into the building. *Id.*
4. TO ENTITLE MATERIAL-MAN TO LIEN, HIS PROPERTY MUST NOT ONLY BE FURNISHED for the erection or repair of a building, but must actually go into the building. *Id.*
5. MATERIAL-MAN'S LIEN, UNDER CONTRACT TO FURNISH SUCH MATERIALS AS BUILDER MAY REQUIRE, who contemplates building several houses on different lots, for which separate accounts with each house are to be kept, must be a separate and distinct lien on each separate building, with its appurtenances, to the amount of material furnished for and used upon

- such building; and a certificate filed in such case, in which the three buildings are included together, and a lien claimed on them all for the gross amount of materials furnished for each and all of them together, is void. *Id.*
6. MECHANIC'S LIEN LAW IS TO BE CONSTRUED WITH REASONABLE STRICTNESS, since it gives a preference to certain creditors by giving them a lien, whereas the policy of the law favors an equal distribution of the effects of a failing debtor. *Id.*
 7. QUESTION OF EFFECT UPON MECHANIC'S LIEN OF PAYMENT, BY SUBSTITUTION OF ANOTHER SECURITY for the debt, must be left an open question in Connecticut, notwithstanding the remarks in *Rose v. Perse and Brooks Paper Works*, 29 Conn. 256. *Id.*
 8. ONE WHO SELLS LUMBER FOR BUILDING HOUSE is not entitled to a lien thereon, under the Arkansas statute, providing that any artisan, builder, or mechanic who shall perform any work and labor on any building, edifice, or tenement shall have an absolute lien thereon for such work and labor, as well as for materials furnished by him in and about such work and labor. *Duncan v. Bateman*, 109.
 9. MERE FACT THAT MATERIALS ARE FURNISHED OR WORK DONE DOES NOT ALONE CONSTITUTE LIEN, where the statute provides that a lien may be acquired by filing a notice in the recorder's office. *Green v. Green*, 428.
 10. MECHANIC'S LIEN FOR WORK DONE OR MATERIALS FURNISHED IN CONSTRUCTION OF HOUSE DOES NOT "ATTACH" until notice of the intention to hold the lien is filed in the recorder's office of the proper county, where the statute provides that such lien may be "acquired" by filing such notice. The notice, however, must be filed within sixty days from the time the building is completed. *Id.*
 11. "ACQUIRED" MEANS "ATTACHES" in mechanic's lien law of Indiana: See 2 R. S. 1852, sec. 650, p. 1852. *Id.*
 12. MECHANIC'S LIEN IS NOT CREATED BY PURCHASE OF LUMBER ON OPEN GENERAL ACCOUNT, without reference to its being put into, or used in, any particular building. *Hill v. Bishop*, 333.
 13. IN IOWA, STATUTE ALLOWS MECHANIC'S LIEN "AGAINST ALL PERSONS EXCEPT INCUMBRANCERS by judgment rendered, and by instrument recorded before the commencement of the work or the furnishing of the material:" See Code 1851, sec. 981. *Monroe v. West*, 524.
 14. LIEN OF MECHANIC OR MATERIAL-MAN DATES FROM COMMENCEMENT OF WORK, or the furnishing of material under his contract, and attaches for all the work done and material furnished under such contract, whether before or after liens subsequently acquired by third persons. For the purposes of his lien, the contract is an entirety. *Id.*
 15. "OWNER," IN IOWA STATUTE RELATIVE TO MECHANICS' LIENS, INCLUDES any person who has "an estate or interest" in the land, and the lien extends to the whole of his "estate or interest:" See Code 1851, secs. 981, 982. *Id.*
 16. MECHANIC CANNOT ENFORCE HIS LIEN UNDER CONTRACT MADE WITH ONE HAVING NO TITLE or interest in the land, or with one having mere possession, but no right to or in the realty. *Id.*
 17. TIME WITHIN WHICH PETITION TO ENFORCE MECHANIC'S LIEN MUST BE FILED CANNOT BE EXTENDED, as against a mortgagee, by an agreement between the material-man and the debtor to extend the time of payment. *Brown v. Moore*, 383.

18. **MECHANIC OR MATERIAL-MAN MAY ENFORCE HIS LIEN AGAINST PROPERTY** for work done or material furnished under a contract with one who holds a bond for a deed to real estate. The subsequent procurement of the full legal title will not affect the lien; in fact, when materials furnished have improved property, after such title is acquired there is all the stronger reason to uphold the lien. *Monroe v. West*, 524.
19. **MISTAKE IN JUDGMENT AS TO DATE WHEN MECHANIC'S LIEN ATTACHED MAY BE CORRECTED** by proper proceedings, where it does not properly interfere with rights to which others, claiming a prior lien, were entitled; as such mistake, if corrected, does not waive any priority to which the plaintiff was entitled, when the judgment was originally rendered. *Id.*
See **INSURANCE**, 14.

MESNE PROFITS.

See **EJECTMENTS**, 3-8.

MINES AND MINING.

1. **MINERALS OF GOLD AND SILVER PASS BY CONVEYANCE OF LANDS** in which they are contained, unless expressly reserved. *Moore v. Smau*, 123.
2. **ON SEPARATION OF MEXICO FROM SPAIN, MINES OF GOLD AND SILVER**, which until then had been vested in the Spanish crown, passed to and vested in the Mexican nation. *Id.*
3. **UNDER MEXICAN LAW, GOVERNMENT GRANT OF MINERAL LANDS** would pass no interest in the minerals, but merely an interest in the soil distinct from that in the minerals, unless by express words the grant passed such minerals. *Id.*
4. **HISTORY OF SPANISH SYSTEM OF WORKING GOLD AND SILVER MINES**, stated. *Id.*
5. **AT DATE OF CESSION OF CALIFORNIA TO UNITED STATES**, minerals existing in land, which had not been discovered, constituted property of the Mexican nation, and hence passed by the cession with all its other property within the limits of California to the United States. *Id.*
6. **MINERALS OF GOLD AND SILVER, WHICH PASSED BY CESSION OF CALIFORNIA** to the United States, were not held by the United States in trust for the future state, nor did the ownership of such minerals vest in the state upon her admission into the Union, such ownership not being an incident of sovereignty; and the United States therefore holds such minerals just as it holds any other public property which it acquired from Mexico. *Id.*
7. **UNITED STATES PATENT TO LAND IN CALIFORNIA**, issued upon a confirmation of claims held under grants of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. *Id.*
8. **OWNERSHIP OF PRECIOUS METALS FOUND IN PUBLIC OR PRIVATE LANDS** is not one of the rights of sovereignty which the United States held in trust for future states. Such ownership stands in no different relation to the sovereignty of a state than that of any other property which is the subject of barter or sale. *Id.*
9. **BY COMMON LAW, RIGHT TO MINES OF PRECIOUS METALS** was not an incident of sovereignty, but a personal prerogative of the king, which could be alienated at his pleasure. *Id.*

MISTAKE.

WHERE PARTY INNOCENTLY MISREPRESENTS FACT BY MISTAKE, if it operates as a surprise and imposition upon the other party, the latter is entitled to relief. *Wells v. Bridgeport Hydraulic Co.*, 250.

See JUDGMENTS, 13; MECHANICS' LIENS, 19.

MORTGAGES.

1. DEED ABSOLUTE ON ITS FACE WILL BE CONSIDERED AS MORTGAGE, as to other creditors, if given to secure a pre-existing debt. *De Wolf v. Strader*, 371.
2. TERMS OF DEED ABSOLUTE ON ITS FACE CANNOT, in a suit at law, be varied by parol so as to make it operative only as a mortgage security. *Bragg v. Massie's Adm'r*, 82.
3. DEED AND MORTGAGE ARE PRESUMED TO BE BUT ONE TRANSACTION when they bear the same date and are between the same parties. *Carroll v. Ballance*, 354.
4. MORTGAGE ON FUTURE NET EARNINGS OF RAILROAD COMPANY for the purpose of securing prompt payment of interest on its construction bonds is valid. *Jessup v. Bridge*, 513.
5. MORTGAGE DEED CONVEYS FEE IN LAND TO MORTGAGEE, whether it be executed to secure the payment of money loaned, or the performance of some other obligation, or to secure the payment of the purchase-money of the land itself. *Carroll v. Ballance*, 354.
6. MORTGAGEE MAY RECOVER MORTGAGED PREMISES IN EJECTMENT against the mortgagor or those claiming under him, when the mortgage debt is payable in installments, and one or more installments are due and unpaid; or even before condition broken. *Id.*
7. MORTGAGOR IN POSSESSION IS NOT ENTITLED TO NOTICE TO QUIT before ejectment can be brought against him by the mortgagee. No tenancy of any kind is created by the mortgage. *Id.*
8. WHERE MORTGAGOR WITH WARRANTY PAYS OFF PRIOR MORTGAGE on the same land, the payment will inure to the benefit of the second mortgagee. But if the money with which such payment is made is furnished in part by a third person, who takes an assignment of the mortgage to himself, and for his own benefit, a resulting trust in his favor attaches at once to the conveyance from the first mortgagee to the mortgagor, to the extent of the portion of the mortgage debt actually paid off by his money. *Kelley v. Jenness*, 623.
9. TRUSTEE OR MORTGAGEE WITH POWER TO SELL is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. And it matters not that the sale was *bona fide* and for a fair price. A court of equity, at the instance of the *cestui que trust*, if he applies within a reasonable time, will set aside the sale, as of course. *Imboden v. Hunter*, 116.
10. MORTGAGEE WITH POWER TO SELL, if he cannot gain the consent of his mortgagor to be allowed to bid at the sale, may apply to chancery, and if it is made to appear that his interests may be sacrificed unless he is permitted to bid, the court will divest him of the character of trustee, that he may be enabled to do so, and will substitute some other person to execute the trust. *Id.*
11. MORTGAGEE, WITHOUT POWER OF SALE, may purchase the same that he could at sheriff's sale, under execution at law. *Id.*

12. **DEED OF MORTGAGE CONVEYING ALL LAND, AND RIGHT AND CLAIM TO LAND**, which the grantor has in the town of Cambridge, does not include land therein, to which he has only a possibility of a reversion, on the non-performance of a condition subsequent. *Richardson v. City of Cambridge*, 767.
13. **PRESUMPTION IS THAT NOTE SECURED BY MORTGAGE OF REAL ESTATE WAS PAID** according to its terms, and the estate of the mortgagee is defeated thereby, if there is no evidence of the time of payment, but the note is found among the mortgagor's papers after his death; and if, after the death of both the mortgagor and mortgagee, the heirs of the mortgagor bring a suit against the heirs of the mortgagee to redeem the mortgage, being in ignorance of the facts, the fact that upon finding the note a settlement is made, by which the note is given up to the latter, will not have the effect of reviving the mortgage. *Id.*
14. **ALTERATION OF MORTGAGE BY ONE MORTGAGOR**, after signature of his co-mortgagor and without the latter's knowledge, by inserting in the description additional property of them both, does not annul the mortgage. It may be enforced against the altering mortgagor as a lien on all the property, and as against the other mortgagor as a lien on the property described in it before the alteration. *Van Horn v. Bell*, 506.
15. **BURDEN OF PROOF TO SHOW THAT MORTGAGE HAS BEEN ALTERED** subsequent to execution is upon the defendant, in an action to foreclose the mortgage, where its execution is not denied under oath. *Id.*
16. **MORTGAGOR IS BOUND TO EXPLAIN CIRCUMSTANCES UNDER WHICH ALTERATION WAS MADE** in mortgage, where the change has apparently been made after delivery. *Id.*
17. **MORTGAGOR MAY RESORT TO OTHER REMEDIES THAN SCIRE FACIAS AGAINST MORTGAGOR**, when one or more of the installments of the mortgage debt are due and unpaid; although he cannot resort to the proceeding by *scire facias* until the last installment is due. *Carroll v. Ballance*, 354.
18. **OBJECT OF SUIT TO FORECLOSE MORTGAGE, UNDER CALIFORNIA LAW**, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand for the security of which the mortgage was given. *San Francisco v. Lawton*, 187.
19. **ALL PERSONS ARE PROPER PARTIES TO SUIT TO FORECLOSE MORTGAGE** who are beneficially interested, either in the estate mortgaged or the demand secured. This rule, generally, will only embrace the mortgagor and the mortgagee, and those who have acquired rights or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. *Id.*
20. **IN SUIT TO FORECLOSE MORTGAGE, ADVERSE TITLES** to the premises held by the parties claiming by conveyance from the mortgagor, prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination, but such titles must be settled in a different action. *Id.*
21. **FORECLOSURE OPERATES ONLY UPON ESTATE OR INTEREST WHICH MORTGAGOR POSSESSED** at the date of the mortgage, and the sale under the decree passes only such interest or estate, except in the single instance where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which inures by way of estoppel to the benefit of the

See CONTRACTS, 9; CORPORATIONS, 7, 10-12; INSURANCE, 24-27; NEGOTIABLE INSTRUMENTS, 13-15.

NUISANCE.

1. LESSEE MAY MAINTAIN ACTION FOR NUISANCE TO REAL ESTATE which he occupies, if injurious to his possessory interest; but for any injury to the reversion, the action must be brought by the landlord. *Sherman v. Fall River Iron Works Co.*, 799.
2. LESSEE MAY MAINTAIN ACTION AGAINST ONE WHO HAS LAID GAS-PIPES in neighboring streets so imperfectly that they constitute nuisance to his possession, in allowing gas to escape through the ground and into the water of a well on his premises which are used for a livery stable, thereby rendering the water unfit for use, and making the enjoyment of his estate less beneficial, although the nuisance may have existed in a less degree when the premises were hired, and may recover for the inconvenience to which he has thereby been subjected, and expenses which he has reasonably and properly incurred in attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted by the gas. *Id.*

See DAMAGES, 2-5.

OCCUPATION.

See ABANDONMENT.

OFFICE AND OFFICERS.

1. ISSUING WRIT IS MINISTERIAL ACT, and may be performed by any one on whom the law may cast the duty. *Flournoy v. City of Jeffersonville*, 468.
2. ISSUING OF PRECEPT FOR COLLECTION OF ASSESSMENT FOR STREET IMPROVEMENT IS MINISTERIAL ACT, and not a judicial one. *Id.*
3. JUDICIAL ACTS ARE SUCH AS ARE PERFORMED by a court, touching the rights of persons or property. *Id.*
4. MINISTERIAL ACT IS ONE WHICH PERSON PERFORMS under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done. *Id.*
5. SURETY WHO SIGNS TOWN COLLECTOR'S BOND ON CONDITION THAT IT SHALL BE SIGNED BY ALL whose names have been accepted by the town as sureties, otherwise the bond should not be delivered, will not be liable on such bond, if all do not sign it, unless he subsequently waives the condition. But if without such condition he signs the bond to indemnify the town, and the bond is left to be delivered and used for that purpose, and is so delivered, he will be bound, notwithstanding he may have expected when he signed it that all whose names were accepted by the town would become sureties. *Inhabitants of Readfield v. Shaver*, 592.
6. PARTY EXECUTING INSTRUMENT CREATING LIABILITY IS ORDINARILY PRESUMED TO KNOW ITS CONTENTS, if no fraud is practiced upon him. *Id.*
7. IF SURETY SIGNS BOND OF COLLECTOR AFTER ERASURE OF ONE OF NAMES accepted as sureties by the town, it is immaterial whether he knew of such erasure or not, if he did not annex to his signing the condition that the bond was not to be delivered until all those accepted by the town should sign. *Id.*

8. **NEGLECT OF TOWN OFFICERS TO ENFORCE COLLECTION OF TAXES**, and their payment over by the collector, or to take the tax bills from him, does not release the sureties on his official bond. *Id.*
9. **WHERE COLLECTOR FOR TWO SUCCESSIVE YEARS PROVES TO BE DEFAULTER** at the end of the second year, he had the right at the time he made payments to the town to have appropriated them to either year; if he then failed to have them appropriated, the town might have had them appropriated as they desired; but if neither party made any appropriation, the law will appropriate such payments to the oldest debts, although by so doing the whole deficit be made to fall on the second year. *Id.*
10. **WHERE COLLECTOR FOR TWO SUCCESSIVE YEARS, AND SURETIES ON HIS BOND** for the second year of his term of office, are sued for an alleged default of such collector, it rests upon the defendants to show what part of the deficit belonged to each year. *Id.*

See BONDS; EQUITY, 3.

PARENT AND CHILD.

FOR INJURY TO MINOR CHILD, FATHER MAY MAINTAIN ACTION FOR LOSS OF SERVICE, EXPENSES, ETC., but the right of action for the personal injury still remains in the child. *Rogers v. Smith*, 483.

PARTITION.

1. **PROCEEDING FOR PARTITION IS SPECIAL PROCEEDING** whose course and effect are prescribed by the statute, and although, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach the judgment therein, yet, so far as the rights of an infant defendant are involved, the court has no jurisdiction except over the matter of partition, and has no power to render a decree divesting the infant's estate, not for the purpose of partition but upon an adverse claim in the plaintiff, in a suit brought against such infant merely for partition. *Waterman v. Lawrence*, 212.
2. **PETITIONER IN PARTITION PROCEEDINGS ALLEGING** that a certain share of the premises is owned by persons therein described, who in fact are not the owners thereof, is not prevented thereby from subsequently purchasing such share from the true owner, and making a valid conveyance thereof, though the partition be made in accordance with the allegations of his petition. *Richardson v. City of Cambridge*, 767.
3. **IN PETITION FOR PARTITION OF LANDS, IT NEED NOT BE AVERRED THAT LAND LIES IN COUNTY WHERE SUIT IS BROUGHT**, if such suit is brought in a court of general and unlimited jurisdiction, as in a circuit court of Indiana. *Godfrey v. Godfrey*, 448.
4. **OBJECTION TO PETITION FOR PARTITION, ON ACCOUNT OF INDEFINITE DESCRIPTION** of land sought to be partitioned, cannot be taken by demurrer. Such uncertain description may, however, be obviated by a motion to require the pleading to be made definite and certain by amendment. *Id.*
5. **WORD "HOLDING," AS USED IN INDIANA STATUTE CONCERNING PARTITION OF LANDS**, does not require actual occupancy, but is equivalent to owning or having title to lands, etc.: See 2 R. S., p. 329, sec. 1. *Id.*
6. **ONE MAY HAVE PARTITION WITHOUT HAVING POSSESSION**, or may have it even against an adverse claimant. *Id.*
7. **ANY PERSON, NOT MADE PARTY, MAY APPEAR AND SET UP TITLE IN HIMSELF** to premises sought to be partitioned, and where such title is set

- up, and found against such person, there seems to be no good reason why partition should not be made among those to whom the land belongs, although such person may have been in possession. *Id.*
3. **FORMER AND PRESENT PRACTICE IN PARTITION.**—Formerly, if the legal title was disputed, chancery would send plaintiff to a court of law to have it established before decreeing a partition. But in Indiana, the distinction between actions at law and suits in equity is now abolished by the code which governs actions for partition, and under the code all questions of title, and perhaps of possession, may be settled in a suit for partition. *Id.*
 4. **JUDGMENT IN PARTITION WILL BIND ONE WHO CLAIMS TITLE**, unless he previously comes in and sets up his claim, if he has any. To demur is insufficient. *Id.*
 10. **BILL OF REVIEW LIES BY INFANT TO SET ASIDE DECREE** rendered in a suit brought against him for partition of common estate, where the decree would be a cloud on or embarrassment to his title, and where the court had no jurisdiction to make such decree. *Waterman v. Lawrence*, 212.

PARTNERSHIP.

1. **AGREEMENT TO KEEP PARTNERSHIP SECRET**, and its mere concealment from plaintiff, who sold goods to one of the firm individually, which goods went to the uses of the concern, does not amount to such a fraud as will avoid the statute of limitations against plaintiff, who did not discover the partnership until after the bar of the statute had operated against him. *Soule v. Atkinson*, 174.
2. **CONTRACT MADE BY COPARTNER IN NAME OF FIRM PRIMA FACIE BINDS FIRM**, unless it is outside the business of the firm. *Stockwell v. Dillingham*, 621.
3. **WHERE PARTNER CONTRACTS DEBT, REPRESENTING TO CREDITOR THAT IT IS FOR BENEFIT OF FIRM**, the firm is liable, whether such representation is true or false, if the transaction is within the scope of the partnership business. *Id.*

See CORPORATIONS, 29; INFANCY, 1.

PATENTS.

See PUBLIC LANDS.

PAYMENTS.

See VOLUNTARY PAYMENTS.

PLEADING AND PRACTICE.

1. **UNDER CALIFORNIA SYSTEM OF PLEADING, THERE IS BUT ONE FORM OF ACTION**, and the statute makes no distinction in matters of form between actions of contract and those of tort, relief being administered without reference to the technical and artificial rules of the common law. *Jones v. Steamship Cortes*, 142.
2. **IN CALIFORNIA, ALL MATTERS MAY BE LITIGATED IN SAME ACTION** which arise from and constitute part of the same transaction. *Id.*
3. **IN CALIFORNIA, CAUSE OF ACTION IN TORT MAY BE UNITED WITH THE CAUSE OF ACTION ON CONTRACT**, if both arise out of the same transaction. *Id.*
4. **PLAINTIFF MUST RECOVER AGAINST ALL DEFENDANTS OR NONE**, in debt on contract. *People v. Organ*, 391.

6. NON-JOINDER OF PLAINTIFF IN TORT can be taken advantage of only by plea in abatement. *Sherman v. Fall River Iron Works Co.*, 799.
6. ALLEGATION IN BILL THAT PETITIONER "IS INFORMED AND VERILY BELIEVES, and thereupon avers," is a direct and positive averment. *Wells v. Bridgeport Hydraulic Co.*, 250.
7. BILL IS NOT MULTIVARIOUS WHEN ALL ALLEGATIONS RELATE TO ONE AND SAME TRANSACTION between the same parties, to one and the same subject-matter, and to the same injury, though it prays for different modes of relief against that injury. *Id.*
8. ALLEGATION THAT ONE DID MALICIOUSLY AND WANTONLY SOMETHING HE HAD RIGHT TO DO states no cause of action. Motive for doing a lawful act is immaterial. *McCune v. Norwich City Gas Co.*, 278.
9. VERDICT IN FAVOR OF PLEADER ESTABLISHES TRUTH OF ALL HIS MATERIAL ALLEGATIONS OF FACT, and nothing more, and when a fact material to the plaintiff's right of recovery is omitted altogether from his declaration, or is not so connected with other facts which are stated that the latter cannot be proved without proving the former, the verdict of the jury ascertains nothing in regard to such omitted fact, and cannot aid the declaration. *Id.*
10. ALLEGATION OF DUTY OR LIABILITY IN DECLARATION IS OF NO AVAIL, unless the facts necessary to raise it are stated. It is but the statement of a legal inference never traversable and of no avail in pleading. Such defect is not cured by verdict. *Id.*
11. DEMURRER TO SPECIAL PLEA AMOUNTING TO GENERAL ISSUE SHOULD BE SUSTAINED. *City of Quincy v. Warfield*, 330.
12. DEMURRER TO PARAGRAPH OF ANSWER MUST BE REGARDED AS HAVING BEEN SUSTAINED, but without exception taken, where an issue of law, upon such demurrer, is submitted to the court at the same time with the issues of fact for trial, under a general denial, and the finding of the court upon all the issues is for the plaintiff. *Harrison v. Martinsville etc. R. R. Co.*, 447.
13. INSTRUMENT SET OUT IN PLEADINGS, THOUGH CALLED BY WRONG NAME, is to have effect according to the intention of the parties. Thus if a release, so called by the pleader, operates in any way, whether as a deed of bargain and sale, a covenant to stand seised, or as an instrument in any manner effectual to pass title, the pleader is to have the benefit of it. *Thornton v. Mulquinne*, 548.
14. PLEADING STRICKEN OUT ON MOTION IS NO PART OF RECORD, unless made so by bill of exceptions. In the absence of such a pleading before the appellate court, the ruling of the court below will be presumed to be correct. *Hill v. Jamieson*, 414.
15. AMENDMENT OF PLEADINGS.—Under the Indiana statute, the court may, at any time in its discretion and on such terms as may be deemed proper, direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim of defense: See 2 R. S., p. 48, sec. 99. *Miles v. Vanhorn*, 477.
16. PRAYER FOR RELIEF AT CLOSE OF INFORMATION CONTAINING SEVERAL PARAGRAPHS must be taken distributively, and applied severally to the paragraphs. *State ex rel. Brown v. Bailey*, 405.
17. CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESS, where want of legal diligence in procuring his attendance, or in taking his deposition, is shown. Thus a failure to make use of the statutory means to procure

- his attendance, or to secure his deposition, where he is out of the state, and on account of his promise to return in time to give his testimony, will not warrant a continuance. *State v. Cross*, 519.
18. AGREEMENT THAT PENDING ACTION SHALL ABIDE RESULT IN ANOTHER CASE, entered on the docket, binds the parties to it; and the defendant, by entering into such an agreement, waives his right to a trial by jury to determine the damages. *Cummings v. Smith*, 629.
 19. COURT MAY, IN ITS DISCRETION, RECEIVE OR REJECT PLEA PUIS DARRIN CONTINUANCE after one continuance. *Id.*
 20. PLEAS PUIS DARRIN CONTINUANCE MUST HAVE SAME CERTAINTY as to time and place as other pleas. If such a plea does not allege the day on which the matter pleaded happened, it is bad. *Id.*
 21. EXCEPTIONS NEVER LIE TO DECISION OF COURT UPON MATTERS WITHIN ITS DISCRETION. *Id.*
 22. MOTION FOR JUDGMENT UPON PLEADINGS IS NO PART OF RECORD, unless made so by a bill of exceptions, or by the order of the court. This question cannot be raised for the first time in an appellate court. *Hill v. Jamieson*, 414.
 23. WHEN AMENDED ANSWER IS STRICKEN FROM FILES, ORIGINAL ANSWER STANDS as if no amended answer had been filed. *Id.*
 24. NONSUIT WITH BILL OF EXCEPTIONS MAY BE TAKEN, ON MOTION, BEFORE TRIAL IS BEGUN, in consequence of suppression of plaintiff's deposition. *Douglas v. Montgomery etc. R. R. Co.*, 76.
 25. PARTY DEFENDING AGAINST OBLIGATION ON ACCOUNT OF MISREPRESENTATIONS, ETC., is entitled to specific instructions to the jury directing their attention to the particular fact in which the alleged misrepresentations, etc., consist. *Mutual Fire Ins. Co. v. Deale*, 673.
 26. PARTY MAY DEMAND THAT INSTRUCTIONS BE REDUCED TO WRITING, and if the court then give them orally, it is error; but exception must be taken or the error is waived. *Heaston v. Cincinnati etc. R. R. Co.*, 430.
 27. IN INSTRUCTING JURY, IT IS PROPER FOR COURT TO DIRECT THEM to determine the case by the evidence, and to disregard all other considerations. *Monday v. State*, 314.
 28. NEW TRIAL MUST BE ALLOWED when a party discovers material evidence during the trial of a criminal case, and the court will not continue or suspend the cause to enable the party to obtain such testimony. *Id.*
 29. NEW TRIAL, WHEN VERDICT IS AGAINST WEIGHT OF EVIDENCE, will be granted in a criminal action; and in the consideration of the evidence greater latitude is allowed than in civil cases: See *State v. Tomlinson*, 11 Iowa, 401. *State v. Cross*, 519.
 30. NO PRESUMPTION EXISTS THAT LOSS OF MISSING SHIP HAPPENED IMMEDIATELY AFTER LAST NEWS; the question when a presumption of loss arises is a question of fact for the jury, to be determined in view of all the facts and circumstances in the case, and when a presumption of loss has arisen, the question as to the precise time when it occurred is to be determined in the same way. *Clifford v. Thomaston Mutual Ins. Co.*, 606.
 31. ERRORS OF LAW AT TRIAL ARE WAIVED, unless brought to the attention of the court on a motion for a new trial. *Hill v. Jamieson*, 414.
 32. WHERE DEFENDANT OBJECTS TO SECOND VERDICT FINDING HIM GUILTY OF SOME OFFENSE, the appellate court will, in reviewing the judgment of the court below upon the evidence, give much weight to the fact that twenty-three jurors had, on a former trial, found him guilty of the same offense, though the verdict in the first trial was set aside because the

- court was satisfied that it was not the free and unbiased conclusion of one of the jurors. *State v. Cross*, 519.
32. VERDICT WILL NOT BE DISTURBED BY APPELLATE COURT, when from the evidence the jury might reasonably have arrived at a conclusion that will support the verdict. *Beall v. Leverett*, 298.
34. VERDICT WILL NOT BE SET ASIDE merely because evidence on question submitted to the jury is not in harmony one portion with another. *Inhabitants of Readfield v. Shaver*, 592.
35. MISTAKE MADE BY CLERK IN PREPARING BLANK VERDICT FOR JURY in the christian name of one of the defendants may be corrected by the court after the return of the verdict, so as to make it conform to the writ and other papers in the case, the jury being present and approving the verdict as amended. *Id.*
36. EFFECT OF APPEAL TO COURT OF ERROR, WHEN PERFECTED, IS ONLY TO STAY EXECUTION upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, is binding upon the parties as to every question directly decided. *Nill v. Compares*, 411.
37. ONE DEFENDANT CANNOT APPEAL ALONE FROM JOINT DECREE AGAINST SEVERAL, and his appeal if so taken will be dismissed. *Lovejoy v. Ireland*, 667.
38. APPELLATE COURT WILL, IN ABSENCE OF EVIDENCE, PRESUME IN FAVOR OF JUDGMENT BELOW, on question as to whether the evidence established a right in the plaintiff to a title deed sued for. This applies to a case where the bill of exceptions does not contain the words, "this was all the evidence given in the cause." *Wilson v. Rybolt*, 486.
- See ATTACHMENTS, 17, 21; CORPORATIONS, 21-30; CRIMINAL LAW; JURISDICTION, 5; SHIPPING, 3; SLANDER, 1; TORTS.

PLEDGE.

1. PLEDGEE HOLDING PLEDGE AS COLLATERAL SECURITY MAY, AFTER DEBT FALLS DUE, ELECT ONE OF THREE REMEDIES: 1. Proceed personally against pledgor for his debt, without sale of pledge; 2. File a bill in chancery for a judicial sale under a regular decree of foreclosure; 3. Sell the pledge without judicial process upon reasonable notice to debtor to redeem. *Robinson v. Hurley*, 497.
2. SALE OF PLEDGE AT MATURITY OF DEBT IS NOT REQUIRED, under instrument executed by pledgee to pledgor, simply dispensing with notice to the latter to redeem before sale. *Id.*
3. MEASURE OF DAMAGES FOR CONVERSION OF PLEDGE BY PLEDGEE is value of pledge at time of conversion. *Id.*
4. DELIVERY OF GOODS TO MERCHANT ENGAGED IN SALE OF SIMILAR ARTICLES is such evidence of the bestowal of the right to dispose of the same as to protect the purchaser from the possessor. But the authority to pledge cannot be inferred from possession in such case; for to pledge is a special transaction, outside of the usual course of business, and consequently outside of the protection extended to ordinary transactions of commerce. *Wright v. Solomon*, 196.

See FACTORS.

POSSESSION.

1. POSSESSION OF PERSONAL PROPERTY IS ONLY PRIMA FACIE EVIDENCE OF OWNERSHIP, and never prevails against the true owner, except with ref-

erence to negotiable instruments and whatever comes under the general denomination of currency. With this exception, the effect of possession as evidence of ownership is subordinate to the principles that no one can be divested of his property without his consent, and that no one can transfer a better title than he has himself. *Wright v. Solomon*, 196.

2. **CONSENT OF OWNER TO DISPOSITION OF HIS PROPERTY MAY BE INFERRED** from acts as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority, according to the custom of trade and the general understanding of business men. *Id.*
3. **WHERE TWO PERSONS ARE IN JOINT POSSESSION** of property, the title being in one, the law will refer the possession to him who has the title. *Bragg v. Massie's Adm'r*, 82.

See **ABANDONMENT; PARTITION**, 6-8.

POWERS.

See **MORTGAGES**, 9-11.

PRESCRIPTION.

See **ATTACHMENTS**, 17, 18; **STATUTE OF LIMITATIONS**.

PROCESS.

1. **SERVICE WHICH AMOUNTS TO ACTUAL AND NOT CONSTRUCTIVE NOTICE**.—Where a copy of the summons regularly issued against a resident of the state is left by the serving officer at the place where such person then resided, the service is to be regarded as actual notice in law, and not constructive notice. *Sturgis v. Fay*, 440.
2. **"USUAL OR LAST PLACE OF RESIDENCE" MEANS** the residence into which the person, still a resident of the state, has moved, in the state, last before the service of process. *Id.*
3. **SERVICE CANNOT BE MADE ON NON-RESIDENT**. *Id.*
4. **DEFENDANT'S ABSENCE IN ANOTHER STATE AT TIME OF SERVICE IS NO REASON FOR SETTING ASIDE RETURN OF SERVICE**, though he was not actually notified of the suit until the first day of the term at which the summons was returnable: See *Conwell v. Atwood*, 2 Ind. 289. *Id.*

See **ATTACHMENTS**, 19.

PUBLIC LANDS.

1. **CESSION OF TERRITORY FROM ONE GOVERNMENT TO ANOTHER** is considered, under the law of nations, independent of treaty stipulations, as passing only public property in and rights of sovereignty over the territory, and does not impair the rights of inhabitants to their property, but they retain all such rights to the same extent as under the former government. *Teschemacher v. Thompson*, 151.
2. **WHEN CALIFORNIA WAS CEDED TO UNITED STATES**, the latter, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants in the ceded territory, and thus included such titles to property as were merely equitable, and had never been perfected under the former government. *Id.*
3. **POWER OF UNITED STATES TO PROVIDE FOR PROTECTING ALL TITLES**, legal and equitable, acquired in California from Mexico, prior to the cession of California to the United States, results from the fact that it is

sovereign and supreme as to all matters connected with treaties, and the enforcement of obligations incurred thereunder, or cast upon it independent of treaty, by the law of nations, upon the cession of the country. *Id.*

4. UNITED STATES MUST DETERMINE FOR ITSELF WHAT CLAIMS TO PROPERTY EXISTED at the date of the cession of a country, which it thereby became bound to protect, and the lands to which they apply, and the parties entitled to the same. *Id.*
5. SUBSEQUENT CLAIMANTS FROM UNITED STATES AFTER CESSION OF CALIFORNIA, of lands therein, take in strict subordination to the action of the government, and they are not entitled to any notice of its proceedings. Whatever interests they may possess were acquired with full knowledge of the treaty of Guadalupe Hidalgo, and of the obligations and powers of the new government. *Id.*
6. PATENT OF UNITED STATES TO CEDED LANDS formerly belonging to another government is not only the deed of the United States, but is a solemn record of the action and judgment of the government with respect to the validity of the title of the claimant existing at the date of the cession. It declares that the previous grant was genuine; the claim under it valid, and entitled to recognition and confirmation; that the grant was or might have been located by the former government, and that it is correctly located by the new government so as to embrace the premises as they are surveyed and described, and while this declaration remains of record, the government itself cannot question its verity, nor can persons do so who claim through the government by title subsequent. *Id.*
7. PATENT TO LAND IN TERRITORY CEDED BY ANOTHER GOVERNMENT TO UNITED STATES is not conclusive against those whose title accrued before the duty of the United States to protect the inhabitants and their property in the ceded territory attached. *Id.*
8. PATENT AS DEED OF UNITED STATES TAKES EFFECT only from the date of the presentation of the petition of the patentees for confirmation of their claim. But as a record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant. *Id.*
9. IF GRANT OF LAND CEDED TO UNITED STATES by another government, upon which a patent is issued, was one of quantity only, requiring at the cession the action of the government to give it location, the duty devolved upon the new government to make the location, and this was essential to perfect the equitable title of the grantees. As the duty of the government attached at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. *Id.*
10. UNITED STATES PATENT TO CEDED LANDS, issued on grant of former government of quantity only, is evidence that the grantees possessed, at the date of the cession, a vested interest in the quantity of land mentioned in the grant; a right to so much land to be afterwards laid off by official authority; that the premises described were then subject to appropriation in satisfaction of the quantity granted; and that the United States government, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed. *Id.*
11. OBJECT OF ACT OF CONGRESS OF MARCH 3, 1851, is "to ascertain and settle private land claims in California," and it does not restrict the

operation of the patents issued by the United States upon confirmation of the claims, to the interests acquired by the claimants from the former government, nor distinguish the patents so issued from other patents issued by the United States; but patents issued under the act are without words of reservation or limitation, except that they shall not affect third persons. *Moore v. Smalls*, 123.

12. UNITED STATES LAND PATENTS PASS TO PATENTEE ALL INTEREST of the United States, whatever it may have been, in everything connected with the soil; in everything forming a portion of its bed or fixed to its surface; and in fact, in everything which is embraced within the signification of the term "land." *Id.*
13. UNITED STATES OCCUPIES ONLY POSITION OF PRIVATE PROPRIETOR, with reference to its real property within the limits of a state, with the exception that such property is exempt from state taxation; and its patent to such property is therefore subject to the same general rules of construction which apply to conveyances of individuals. *Id.*

See MINES AND MINING.

QUO WARRANTO.

1. QUO WARRANTO MAY BE SUSTAINED AGAINST CORPORATIONS WHEN.—Filing false and fraudulent articles of association is a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation. *State ex rel. Brown v. Bailey*, 405.
2. QUO WARRANTO AGAINST CORPORATION, WHEN NOT SUSTAINABLE.—Present insolvency is not a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation. *Id.*

RAILROADS.

1. RAILROAD COMPANY IS NOT BOUND TO KEEP PATROL AT NIGHT ALONG ITS ROAD to see that the fence is not broken down. If the company uses all reasonable diligence to keep up a good and sufficient fence, it is not guilty of negligence in that particular. *Illinois Central R. R. Co. v. Dickerson*, 394.
2. IT IS IMMATERIAL TO WHOM TRAIN CAUSING INJURY BELONGS, if it was in the care of the defendants' servants, subject to their exclusive direction and control at the time of the accident. *Fletcher v. Boston etc. R. R.*, 695.
3. RAILROAD PASSENGER TICKET, DATED AND HAVING WORDS "GOOD ONLY TWO DAYS AFTER DATE" stamped upon its face, is not valid after the expiration of the two days, and the railroad company may recover its usual fare. *Boston and Lowell R. R. Co. v. Proctor*, 729.

See COMMON CARRIERS; HIGHWAYS, 8; MORTGAGES, 4; NEGLIGENCE, 8-9, 10, 12.

RAPE.

See CRIMINAL LAW, 2, 11.

REALTY.

PERSON HAS "INTEREST" IN LAND, where he holds a bond for a deed, under which he has entered into possession and exercised acts of ownership. *Monroe v. West*, 524.

See PUBLIC LANDS.

RECORDS.

See COURTS; JUDGMENTS.

REFEREES.

1. COURT HAS NO POWER TO SEND ORDINARY ACTION AT LAW TO REFEREE for trial, against the objection of either party, whether the action requires the examination of a long account, or not. *Grim v. Norris*, 206.
2. CALIFORNIA STATUTE AUTHORIZING REFERENCE OF CASES is solely applicable to proceedings in equity. The right of trial by jury, in all common-law actions, is secured by the constitution of the state. *Id.*

RELEASE.

See DEEDS, 16.

REMAINDERS.

See GIFTS, 3.

REMEDIES.

See CONSTITUTIONAL LAW.

REPLEVIN.

1. REPLEVIN AT COMMON LAW DEFINED. *Wilson v. Rybolt*, 486.
2. DETINUE FOR UNLAWFUL DETENTIONS, AND REPLEVIN FOR UNLAWFUL TAKINGS, were finally made, at common law, to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned. *Id.*
3. DETINUE AND REPLEVIN, IN THEIR FULLEST SCOPE, WERE FORMERLY IN USE IN INDIANA, but the whole ground for both these actions is now covered by the code provision for the recovery of personal property. *Id.*
4. JUDGMENT IN REPLEVIN AGAINST ONE OF TWO JOINT TAKERS FOR PORTION OF CHATTELS TAKEN and nominal damages, under which all the property is recovered, some of it, however, in a damaged condition, is a bar to a subsequent action against both takers for further damages for the taking and detention. *Bennett v. Hood*, 705.
5. WHERE PORTION OF CHATTELS CANNOT BE REPLEVIED, BECAUSE DEFENDANTS HAVE DESTROYED, concealed, or sold such portion, the plaintiff may replevy that part of the property that can be found, and maintain a separate action to recover the value of that which had been thus severed, *semble*. *Id.*
6. DOCTRINE THAT ACTION LIES AGAINST EACH OF SEVERAL CO-TRESPASSERS, and that plaintiff may elect *de melioribus damnis*, does not permit that one, after obtaining a judgment in replevin against one trespasser, may afterwards sue the other for damages, or that he may afterwards maintain a joint action against both. *Id.*

See ATTORNEY AND CLIENT, 6, 9, 11; FIXTURES, 1.

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW, 8, 12, 13.

RIPARIAN RIGHTS.

1. EVERY PROPRIETOR OF LAND ON BANKS OF STREAM HAS NATURALLY EQUAL RIGHT to the use of the water, and this right to use implies a

right to control it, and to a reasonable extent to diminish its volume. *Davis v. Getchell*, 636.

2. REASONABLENESS OF DETENTION OF RUNNING WATER DEPENDS UPON SIZE OF STREAM, as well as the use to which it is subservient. In small streams the water may be detained for a reasonable time in order to accumulate a head which can be made available for practical use; but the right to detain is not limited to the time necessary for repairs, or to extraordinary occasions. *Id.*

SALES.

1. OWNER OF PROPERTY CAN SELL IT AND GIVE GOOD TITLE TO BONA FIDE PURCHASER despite his creditors, up to the time when they shall have acquired a lien. *McMahon v. Morrison*, 418.
2. SALE OF PROPERTY BY DEBTOR, EVEN IF VOID AS AGAINST CREDITORS, is good as between himself and his vendee, and all the world except his creditors. And such a sale cannot be attacked by a creditor merely because he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property. *Bickerstaff v. Doub*, 204.
3. IT IS FALSE REPRESENTATION if a vendor exhibits a mule to a proposed vendee, and at that time represents the animal sound, if he knows to the contrary, even though the vendor afterwards says to such vendee: "The animal will be sold in a short time at auction, and you will then have a chance to buy him;" and about an hour subsequently the mule is offered for sale at auction, and the proposed vendee purchases the mule upon the prior representations of the seller. The fact that at the auction it was stated that the vendor did not warrant or guarantee the animal in any particular does not alter the rule. *Harris v. Mullins*, 320.
4. DOCTRINE OF CAVEAT EMPTOR applies to a purchaser where the title to the land depends upon the construction of a will, which is on record. *Id.*
5. WHERE GOODS ARE OBTAINED BY FRAUD, VENDOR MAY RECLAIM THEM AGAINST ALL PERSONS except a bona fide purchaser without notice, and an officer who takes them in behalf of creditors by legal process does not come within the exception. *Atwood v. Dearborn*, 755.
6. ACTION LIES AGAINST OFFICER TO RECOVER GOODS ATTACHED BY HIM as the property of a person who purchased them from the plaintiff by means of false representations, without proof that the attaching creditor had knowledge of the fraud. *Id.*
7. ADMISSIONS OR REPRESENTATIONS OF VENDOR MADE AFTER OTHER PERSONS HAVE ACQUIRED SEPARATE RIGHTS in the same subject-matter cannot be received to disparage their title. The rights of the vendee and those claiming under him cannot in this way be impaired or affected. *Simpson v. Carlton*, 707.

See AGENCY, 2; ATTACHMENTS, 9; EXECUTORS AND ADMINISTRATORS; SLAVERY, 12; STATUTE OF FRAUDS.

SALVAGE.

See ABANDONMENT.

SHERIFFS.

1. SHERIFF IS NAKED TRESPASSER, AND LIABLE IN DAMAGES, if, having levied upon property of an execution debtor, he proceeds to sell the same, not

withstanding the defendant in execution has obtained, from the court in which the judgment was rendered, an injunction restraining the plaintiff in the judgment, his servants and agents, from proceeding to sell under such execution, which injunction has been served upon the sheriff; and this, though the sheriff be not a party to the injunction suit. *Buffandeau v. Edmondson*, 139.

2. **SHERIFF'S RETURN MAY BE AMENDED**, before the adjournment of the term of court at which it was made, by leave of the court. *Boyd v. Chesapeake etc. Canal Co.*, 646.

SET-OFF.

- SET-OFF CAN ONLY BE MADE AGAINST REAL PARTY IN INTEREST.** *Flournoy v. City of Jeffersonville*, 468.

SHERIFFS.

See ATTORNEY AND CLIENT, 10, 12; EVIDENCE, 4; EXECUTION, 8.

SHIPPING.

1. **IN ACTION BY HUSBAND AND WIFE AGAINST STEAMSHIP** for injuries inflicted upon the wife, brought under section 317 of the California practice act, plaintiffs cannot recover disbursements or expenditures by the husband. For these he must sue alone. *Sheldon v. Steamship Uncle Sam*, 193.
 2. **LIABILITY OF STEAMSHIP IN ACTION** under section 317 of the California practice act is measured by that of the owners, and extends to the entire injury sustained. *Id.*
 3. **PRACTICE IN COURTS OF ADMIRALTY HAS NO APPLICATION** to actions brought under section 317 of the California practice act by husband and wife against steamship for injury inflicted on the wife. *Id.*
- See ATTACHMENTS, 8, 11-14; COMMON CARRIERS; HUSBAND AND WIFE, 8.

SLANDER.

1. **COMPLAINT IN SLANDER MUST AVER THAT WORDS NOT ACTIONABLE PER SE WERE USED IN CRIMINAL SENSE.** The want of such averment cannot be supplied by the innuendo, for the reason that that branch of the pleading cannot aver a fact, or change the natural meaning of words. *Miles v. Vanhorn*, 477.
2. **WORD "SCREWED" DOES NOT OF ITSELF IMPORT SEXUAL INTERCOURSE**, but it may, when spoken in certain localities, involve the charge of whoredom; and when it is thus used, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used. *Id.*
3. **ACTIONABLE WORDS.**—The words, "She is in the family way, and I can prove by A that she has been taking camphor and opium pills to produce an abortion," when spoken of an unmarried female, are slanderous. *Id.*
4. **UNAUTHORIZED AMENDMENT OF PLEADINGS IN SLANDER.**—An amendment, in an action for slander, which embraces an entirely new set of words, essentially different from those previously alleged, and of themselves constituting a new cause of action, is unauthorized. *Id.*
5. **PLAINTIFF, IN SLANDER, CANNOT INTRODUCE EVIDENCE OF GOOD CHARACTER**, where the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, but has not attempted to impeach the general character of the plaintiff. *Id.*

SLAVERY.

1. PRIVATE SALE BY ADMINISTRATOR OF SLAVE, the property of his intestate's estate, does not divest the title of the estate, but estops the administrator himself from recovering the property from his vendee. *Brogg v. Massie's Adm'r*, 82.
2. PRIVATE SALE BY ADMINISTRATOR OF SLAVE, the property of his intestate's estate, perfected by delivery, estops the administrator from relying on the invalidity of the sale, if he subsequently acquires possession; while a subsequent recovery by the purchaser against the administrator does not bar the title of the estate in the slave. *Id.*
3. UPON MARRIAGE, MARITAL RIGHTS OF HUSBAND attach to slave owned by the wife prior to marriage, and upon an exchange of slaves by her during the coverture, in the presence and with the approbation of the husband, his marital rights attach to the slave received in exchange. *Id.*

SOVEREIGNTY.

See CONSTITUTIONAL LAW, 1, 2.

SPECIFIC PERFORMANCE.

1. IN DECREETING SPECIFIC PERFORMANCE, a court of equity must have some certain and specific act which ought to be performed by the delinquent party to act upon, and it will decree that it be performed; but it cannot enter a general decree that in future the delinquent party shall perform the acts required of him by his contract. Such a decree would be too general and indefinite. *Atlantic etc. R. R. Co. v. Speer*, 305.
2. DELAY OF MORE THAN THREE YEARS TO PAY INSTALLMENTS OF AGREED PRICE FOR LAND, after the same became due, according to the terms of a written agreement for the conveyance of the same, and after a refusal by the owner of the land to give any further time for making the payments, is such laches as will forfeit all claim to the performance of the contract; and a bill in equity will not lie by the creditor of the person to whom the agreement was given to compel a sale of the land, and the application of the proceeds to the payment of his debt. *Fuller v. Hovey*, 782.

STATUTES.

1. PUBLICATION OF STATUTE IS EFFECTED UNDER INDIANA CONSTITUTION, when the act is distributed, by the secretary of state, in a bound volume, in all the counties of the state. *State ex rel. Brown v. Bailey*, 405.
2. PROVISIONS AS TO FORM OF BINDING, COLOR OF MATERIALS, ETC., OF STATUTES, ARE DIRECTORY ONLY, and failure of strict compliance with such provisions will not render the distribution of such statutes as are prepared and distributed any the less a publication of them. *Id.*
3. WHETHER STATUTE IS IN FORCE AT GIVEN TIME IS QUESTION FOR COURT to determine by judicial knowledge. *Id.*
4. EIGHT AND ONE HALF MONTHS IS AMPLE TIME TO ENABLE SECRETARY OF STATE TO PUBLISH AND DISTRIBUTE SPECIFIED LAWS, and courts will presume that he has done so, where he has been lawfully directed to do it. *Id.*
5. UPON REPEAL OF PENAL STATUTE, ALL PENALTIES FALL, EVEN IF GIVEN TO INDIVIDUALS, and though suit has been brought and is pending for them. *Welch v. Wadsworth*, 236.

6. ONE PURPOSE OF PROCEEDINGS UNDER CHAPTER 126, IOWA REVISION OF 1860, is to obtain an order for the payment of the debt; and not alone to settle the right of the creditor to the application of the proceeds of a certain fund. *Ex parte Grace*, 529.

See CONSTITUTIONAL LAW; EVIDENCE, 12.

STATUTE OF FRAUDS.

1. ORAL CONTRACT BY ONE PERSON TO DELIVER TO ANOTHER ONE HUNDRED SEWING-MACHINES, at a time and place designated, upon condition that a part of them not then finished should be completed in season by a third person, who was making them for the former, he not being a manufacturer of machines himself, but having fitted up a shop for their manufacture, and contracted with such third party to occupy the shop and make the machines for him at a certain price each, he furnishing the shop-room, materials, and tools, is a contract for the sale, and not for the manufacture, of the machines, and therefore within the statute of frauds, where at the time of the making of the contract thirty-six of the machines were completed, and the remaining sixty-four were being manufactured in the shop, and the whole were to be boxed up and delivered together. *Attwater v. Hough*, 229.
2. ENTIRE CONTRACT CANNOT BE WITHIN STATUTE OF FRAUDS TO PART of it and without the statute as to the residue. An entire contract for the sale of goods which is as to a part of the goods within the statute is wholly within the operation of the statute. *Id.*
3. FACT THAT GOODS SOLD ARE TO BE BOXED AND TRANSPORTED to the place of delivery by the seller does not take the sale out of the operation of the statute of frauds. *Id.*
4. EXAMPLE OF PERSONAL CONTRACT NOT WITHIN STATUTE OF FRAUDS.—A personal contract, as one for personal services, for an indefinite period, or a term of years, and which will terminate with the death of the party making it, is not within the subdivision of the statute of frauds requiring contracts not to be performed within a year to be reduced to writing; because such a contract might, by the death of the party, be fully performed within one year. *Hill v. Jamieson*, 414.

See GROWING CROPS.

STATUTE OF LIMITATIONS.

1. WHERE FACE OF BILL SHOWS CASE BARRED BY STATUTE OF LIMITATIONS, and no circumstances are stated which take the case out of the operation of the act, the defendant may take advantage of it by demurrer, and is not bound to plead or answer. *City of Apalachicola v. Apalachicola Land Co.*, 284.
2. BRINGING ACTION, THOUGH ERRONEOUS IN FORM, WILL SAVE CLAIM FROM BAR OF STATUTE OF LIMITATIONS, under the Indiana statutes. *Flournoy v. City of Jeffersonville*, 468.

See ATTACHMENTS, 17, 18; PARTNERSHIP, 1.

STREETS.

See HIGHWAYS.

SUBSCRIPTIONS.

1. ACTION MAY BE MAINTAINED IN HIS OWN NAME BY ONE DESCRIBED AS TREASURER OF UNINCORPORATED ASSOCIATION upon a subscription pay-

able to him as such treasurer. The words describing him as treasurer should be treated as surplusage. *McDonald v. Gray*, 509.

2. **ERECTOR OF CHURCH EDIFICE IS SUFFICIENT CONSIDERATION** to authorize recovery on subscription made for the purpose of such erection. *Id.*
See CORPORATIONS.

SURETYSHIP.

1. **SURETY WHO PAYS JUDGMENT**, and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment in the name of the creditor, for the amount which he has paid as surety. *Connely v. Boury*, 568.
 2. **RIGHT TO RECOVER COSTS** as well as principal and interest of debt, against a first indorser as surety, is transferred to a second indorser by the effect of the legal subrogation, which results from his payment of the debt to the judgment creditor. *Id.*
 3. **SURETIES ON BOND ARE NOT DISCHARGED**, where, from the mere omission of the obligee to probate a claim in time, the cause of action is barred against the estate of the principal, in the hands of his executor or administrator, by the statute of non-claim—this statute being in its nature but a statute of limitation. *Ashby v. Johnston*, 102.
- See ATTACHMENTS, 13, 14; ATTORNEY AND CLIENT, 9-11; OFFICE AND OFFICERS, 5-10.

TAXATION.

1. **PROPERTY SHOULD BE ASSESSED, FOR PURPOSES OF TAXATION, AT ITS PRESENT VALUE**, and not at its prospective value. *State v. Illinois Central R. R. Co.*, 396.
2. **RAILROAD PROPERTY SHOULD BE ASSESSED, FOR PURPOSES OF TAXATION**, according to its value for the purposes for which it is constructed, and not for any other purposes to which it might be applied. *Id.*
3. **IN ASCERTAINING PRESENT VALUE OF RAILROAD PROPERTY, FOR PURPOSES OF TAXATION**, an important element is the amount of net profits, if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income; but in connection with this, there should be considered what prudent men would give for the property, as a permanent investment, with a view to present and future income. *Id.*
4. **PERSONAL PROPERTY MAY BE TAXED WHERE IT IS PERMANENTLY LOCATED**, although in general personal property follows the residence of the owner and is there taxable. *Mills v. Thornton*, 377.
5. **BILL TO ENJOIN COLLECTION OF TAXES ON PERSONAL PROPERTY IN CERTAIN DISTRICT MUST AFFIRMATIVELY SHOW** that the property was not taxable there. *Id.*
6. **FOR PURPOSES OF TAXATION**, a bridge over the Potomac river, and other property lying within the state of Maryland, belonging to a bridge corporation which does business in Virginia, is assessable in the county in which it is situated under a Maryland law, which provides that the property of a corporation having no place of business in the state shall be assessed for taxation in the county where such property is situated. *O'Neal v. Virginia Bridge Co.*, 669.
7. **RELIEF IN EQUITY FROM ASSESSMENT**.—An assessment was made and entered on the assessor's books against the "Potomac Bridge Company,"

when the true corporate name was "The Virginia and Maryland Bridge Company at Shepherdstown," and the company knew of the assessment, and did not appear before the board of commissioners, which had authority to determine complaints, etc., of persons aggrieved by the valuation of the assessor, to have such error corrected, or for any purpose; it was held that a court of equity could not interfere in behalf of such corporation to relieve it from the payment of the tax assessed. *Id.*

8. TAXES ARE LAID FOR SUPPORT OF GOVERNMENT, and all property made liable to contribute to this end ought to be embraced in assessments for that purpose. *Id.*
9. ASSESSMENTS FOR TAXES ought not to be vacated, and property released from taxation, because public officers have not strictly followed the statutes, which are merely directory. A substantial compliance with the statutory directions is sufficient. *Id.*
10. PROPERTY OWNERS MUST SEEK RELIEF against the improper exercise of the power of taxation in the manner pointed out by statute. If he fails to do so, he must present a very strong case to get relief in equity, if indeed he can be relieved at all. *Id.*
11. DOCTRINE OF ESTOPPEL DOES NOT APPLY in cases where an owner of land has petitioned to have a highway, upon which his land fronts, graded, and has presented such petition to an officer, who proceeds upon the petition without authority of law, and levies a tax, etc., upon the land for the purposes of the grading. In such a case, the petitioner is not estopped from enjoining an illegal sale of his property to pay said tax. *Mayor etc. of Baltimore v. Porter*, 686.
12. IF LAW RELATING TO LEVY OF TAX is not strictly pursued by the officers, the tax will be void, and cannot be enforced by a sale of the property upon which it is levied and assessed. *Id.*

TENDER.

See CORPORATIONS, 6.

TIDE-WATERS.

See BOUNDARIES.

TIME.

WORD "MONTH" AND WORDS "THIRTY DAYS" ARE SYNONYMOUS TERMS in the general railroad law of Indiana. *Heaton v. Cincinnati etc. R. R. Co.*, 430.

TORTS.

1. PARTY MAY SUE IN TORT INSTEAD OF UPON CONTRACT, where the breach of the contract constitutes a wrong. *Sheldon v. Steamship Uncle Sam*, 198.
2. COMPLAINT IN TORT SHOULD BE FRAMED FOR PARTICULAR CAUSE OF ACTION PARTY HAS RIGHT TO SUE FOR; but if it includes two or more causes of action, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. This is the common-law rule. *Rogers v. Smith*, 483.
3. WHERE COMPLAINT IN TORT CONTAINS TWO OR MORE DISTINCT CAUSES OF ACTION IN ONE COUNT, it is duplicity under code. The remedy is by motion to strike out, and not by demurrer. *Id.*

See HUSBAND AND WIFE, 10; PLEADING AND PRACTICE, 2, 5.

TREATIES.

See EVIDENCE, 11.

TRESPASS.

See LANDLORD AND TENANT, 3; LICENSE; MORTGAGES, 25; REPLEVIN, 60; SHERIFFS, 1.

TRUSTS.

1. IMPLIED OR RESULTING TRUSTS arise where a purchase is made by one person in the name of another. Such trusts arise by operation of law, are not within the statute of frauds, and may be proved by parol. *Mutual Fire Ins. Co. v. Deale*, 673.
2. NO EQUITABLE PRESUMPTION OF TRUST ARISES where the grantee of property is related to the person from whom the consideration proceeds, in such a manner that the latter is under a moral or natural obligation to provide for the former, but *prima facie* the transaction will be regarded as an advancement for the benefit of the nominee. This may be rebutted by evidence clearly showing that a trust was intended to be created in favor of the person who paid the purchase-price. *Id.*
3. EVIDENCE USED TO ESTABLISH RESULTING TRUST must be of facts and statements of the parties, which happened or were made contemporaneously with the purchase. An exception to this rule is that the declarations of the trustee may be received in evidence, if made at any time, to establish such a trust. *Id.*
4. TRUST ESTATE IS NOT SUCH AFTER-ACQUIRED TITLE AS INURES TO BENEFIT OF GRANTEE of the trustee who makes the conveyance in his individual capacity. And an implied trust is governed by the same general rules as other trusts. *Kelley v. Jenness*, 623.
5. WHERE TRUSTS, EVEN OF OFFICIAL CHARACTER, HAVE BEEN VIOLATED, equity takes jurisdiction. *Norton v. Hixon*, 338.
6. TRUSTEE IS ENTITLED TO NO COMMISSIONS where he accepts the trust coupled with an interest, and the deed expressly provides for the payment of the expenses of the trust, but is silent as to whether he shall have compensation for his trouble and attention. *Imboden v. Hunter*, 116.

See MORTGAGES, 8-11.

USAGE.

See CUSTOM.

UNINCORPORATED SOCIETIES.

See SUBSCRIPTIONS.

USURY.

1. ACT VALIDATING USURIOUS LOAN OF SAVINGS AND BUILDING ASSOCIATION TO MEMBER THEREOF, though it injuriously affects an antecedent legal right of the borrower to insist upon the forfeiture by the lender of the whole interest, is not nevertheless, considering the nature of the right affected and the circumstances of the case, to be regarded as unjust or as an infringement of a vested right. *Welch v. Wadsworth*, 236.
2. RIGHT OF BORROWER TO INSIST UPON FORFEITURE BY LENDER OF WHOLE INTEREST, though a legal right, is not to the full extent an equitable one.

If the borrower goes into equity in respect to a usurious contract, he will be compelled to pay the principal and legal interest, because there is a moral obligation resting upon him to do so. *Id.*

2. PARTIES TO USURIOUS CONTRACTS HOLD ANY RIGHT THEY MAY HAVE TO PENALTIES GIVEN BY LAW, subject to a modification or repeal by the legislature, and a consequent direct or indirect validation of the contracts. *Id.*

See CONSTITUTIONAL LAW, 7; NEGOTIABLE INSTRUMENTS, 2.

VENDOR AND VENDEE.

1. WHERE THERE IS ENTIRE FAILURE OF TITLE TO REAL ESTATE CONVEYED WITH COVENANTS OF WARRANTY, measure of damages for breach of covenants, in absence of fraud, is the purchase-money and interest. *Phillips v. Reichert*, 463.
2. WHERE EVICTION IS PARTIAL, DAMAGES WILL BEAR SAME PROPORTION TO WHOLE PURCHASE-MONEY that the value of the part to which the title fails bears to the whole premises, estimated at the price paid. *Id.*
3. COVENANTS BIND COVENANTOR THAT HE IS SEISED OF LAND, AND THAT HE WILL WARRANT AND DEFEND TITLE, or in default thereof that he will return the purchase-money and interest; or if the title fail in part, that he will return a ratable proportion of the purchase-money and interest. *Id.*
4. FACT THAT LAND WAS BOUGHT FOR PARTICULAR PURPOSE, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants. *Id.*
5. FRAUD AS GROUND OF DAMAGES.—Where title to land fails in whole or in part, and fraud can be shown, or concealment, which would be evidence of it, it will constitute a good ground of action, in which the purchaser can recover all his damages. *Id.*
6. BASIS OF DAMAGES FOR PARTIAL FAILURE OF TITLE is the relative general value of the part to which the title fails compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value. *Id.*
7. VENDOR'S LIEN IS NOT EXTINGUISHED by a judgment of a county court allowing and ordering the payment of a claim against an estate. *Hays v. Horine*, 518.
8. PART PAYMENT DOES NOT EXTINGUISH VENDOR'S LIEN. It still remains a security for the balance unpaid. *Id.*
9. WHERE LIEN ONCE EXISTED, IT STILL CONTINUES, unless intentionally displaced, or waived by consent of the parties. *Id.*
10. BURDEN OF SHOWING WAIVER OF VENDOR'S LIEN IS ON PURCHASER. *Id.*
11. VENDEE MAY RESCIND CONTRACT FOR SALE OF LAND FOR VENDOR'S INABILITY TO CONVEY, and recover the money paid on the contract, in an action for money had and received. *Smith v. Lamb*, 381.
12. VENDEE NEED NOT TENDER BALANCE OF PURCHASE-MONEY FOR LAND before he can maintain an action against the vendee to recover back the money paid on his contract, when the vendor admits that he has not the title and could not convey. *Id.*

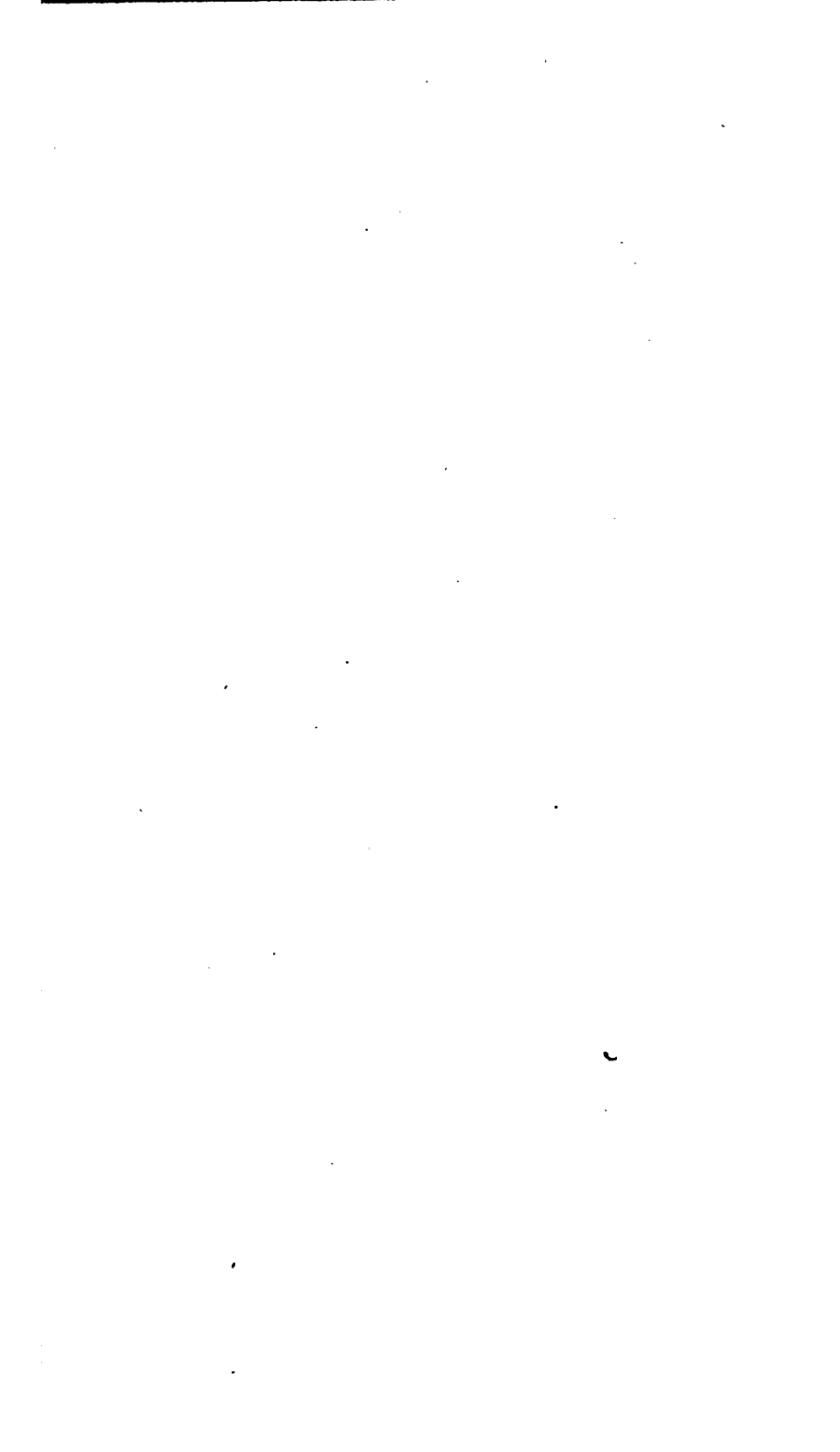
See COVENANTS; DEEDS; ESTATES OF DECEDENTS; MORTGAGES, 22.

VERDICT.

See PLEADING AND PRACTICE, 9, 10, 29, 32, 34, 35.

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